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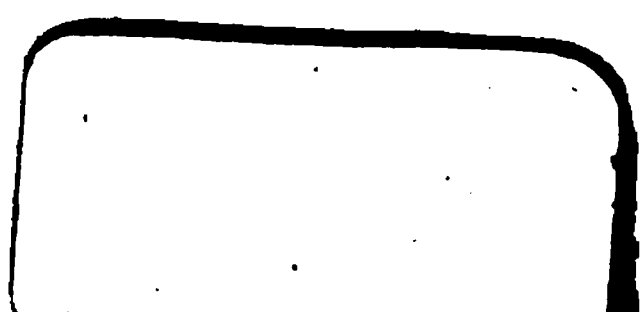
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JSD
JAN
ULY
V,

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY

JOHN BAYLY MOORE, Esq., OF THE INNER TEMPLE,

AND

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BARRISTER AT LAW.

VOL. II.

(CONTAINING THE CASES FROM TRINITY TERM, 9 GEO. IV. 1828,

TO

HILARY TERM, 9 & 10 GEO. IV. 1820, BOTH INCLUSIVE.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

**The Right Hon. Sir Wm. DRAPER BEST, Knt., Lord Chief
Justice.**

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir JAMES BURROUGH, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

A

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ERRATA.

- Page 180, line 38, in marginal note, for "*bankrupts*" read "*freighters*."
331, — 10, for "*page 347*" read "*page 337*."
366, — 13, for "*took*" read "*too*."
441, — 11, after "*said*" insert "*(a)*."

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN TRINITY TERM,

IN THE NINTH YEAR OF THE REIGN OF GEORGE IV.

CALVERT v. TOMLIN.

Friday,
June 6th.

THE defendant, having been sued by the plaintiff, on the 8th *February*, in the last *Hilary* Term, gave the attorney for the latter a *cognovit* in the following form, *viz.* "I now confess this action, and that the plaintiff hath sustained damages to the amount of 50*l.*, besides his costs, to be taxed, &c. No judgment is to be entered up, or execution to be issued, until the 1st day of *April* next, in default of payment of the sum of 2*l.*, being the debt in this action, together with the costs, &c." The defendant died on the 16th *February*, and previously to the last term, *viz.* on the 10th *April* last, the plaintiff caused judgment to be entered up, and sued out a writ of *fieri facias* thereon, tested on the first return-day of *Hilary* Term, which was antecedent to the defendant's death.

The defendant gave the plaintiff a *cognovit*, in *Hilary* Term, subject to a defeazance that no judgment should be entered up, or execution issued, until the 1st *April* then next. The defendant died in vacation before that day, and the plaintiff afterwards, and before *Easter* Term, entered up judgment and sued out a *fi. fa.* thereon tested on the 1st return-day of *Hilary* term:—
Held regular, the judgment

having relation to the first day of the term of which it was entered up.

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Mr. Serjeant *Wilde*, in the course of the last Term, obtained a rule *nisi* that this judgment and execution might be set aside, on the ground that the former was not entered up, nor the latter sued out, until after the death of the defendant.

Mr. Serjeant *Cross* now shewed cause.—This application is in fact made by the executors of the defendant, he having died before the judgment was entered up. By general intendment of law, the judgment has relation to the first day of the term of which it is entered up; and, as the writ of *fieri facias* sued out thereon, was tested of a day in that term before the defendant's death, the proceedings are strictly regular. The giving the *cognovit* was the defendant's own act. He thereby acknowledged the plaintiff's cause of action, and the plaintiff would have been entitled to enter up judgment and sue out execution *instantly*, but for the condition to extend the time for so doing to the 1st of *April*. Since, therefore, a judgment has relation to the first day of the term preceding the vacation in which it is signed, if a defendant die in term time, and judgment is regularly signed afterwards, either in that term or in the following vacation, it has relation back to a day before the death; and, since an execution may be taken out on any day in term time, or in vacation, tested the first return-day in the term; and, as an execution taken out after the defendant's death, if tested before, is regular, it follows that, in the present case, the *fieri facias* sued out in the vacation following the term in which the judgment was signed, tested as of the first day of term, and therefore of a day previous to the death, was regular; and the defendant's goods in the hands of his executor, or elsewhere, might be taken under it. This principle was established in *Bragner v. Langmead* (a); and the only distinction between that

(a) 7 Term Rep. 20.

case and the present is, that there the plaintiff signed judgment after verdict, whilst here the defendant gave a *cognovit*, which is in fact a judgment by confession. So, in *Waghorne v. Langmead* (a), this Court held, that the execution of a writ of *fiери facias*, tested before the defendant's death, but not delivered to the sheriff to be executed until after, was regular; and in *Wyborne v. Ross*, the Court observed (b), that a *cognovit* is a mere acknowledgment of the amount of the damages; that, where a man acknowledges the cause of action, the plaintiff may sign judgment at any time; and that a *cognovit* is not like a warrant of attorney.

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Mr. Serjeant *Wilde*, in support of his rule.—In *Bragner v. Langmead*, and *Waghorne v. Langmead*, the plaintiffs had obtained verdicts; and the statute 17 Car. 2, c. 8, provides for cases where a party dies between verdict and judgment, but does not apply to the case of a *cognovit*, on which judgment is not to be entered up until a certain specified time has expired. In *Tidd's Practice*, it is said (c): “At common law, the death of a sole plaintiff or defendant, before final judgment, would have abated the suit; but, as the judgment relates to the first day of term, if the party be alive after that day, it may be entered, and costs taxed thereon, after his death: and, if either party had died in vacation, after the plaintiff was entitled to enter judgment on a warrant of attorney, judgment might have been entered that vacation, as of the preceding term, and it would have been a good judgment at common law as of the preceding term.” But, here, the plaintiff had no right to enter up judgment until after the 1st of *April*, that being the day on which the payment was to be made; and the defendant died on the 16th *February* preceding. It is, therefore, clear that the plaintiff could not be entitled to enter up judgment at the time of

(a) 1 Bos. & Pul. 571. (b) 2 Taunt. 68. (c) Vol. 2, 8th Edit. 965.

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the death, or until six weeks afterwards. It is a rule of this Court, that, on an application to enter up judgment on an old warrant of attorney, it must appear by affidavit that the defendant was alive on a day within the term in which the application is made (*a*); and here, as the plaintiff could not have entered up judgment in *Hilary* Term if the defendant had been alive, so he cannot be put in a better situation by his death.

[Mr. Justice *Park*.—In *Odes v. Woodward* (*b*), where an objection was made to a judgment signed after the death of the party, although tested of the term before he died, Lord Chief Justice *Holt* said: “If *A.* recover judgment against *B.*, and *B.* die in the vacation, within the year, at the end of it *A.* may sue out a *fiery facias* as of the preceding term, and levy the goods of *B.* in the hands of his executors.”]

The distinction is, that, in this case, the plaintiff could not enter up judgment until after a certain day; and, as the *cognovit* was given as a compromise of the suit, the plaintiff should be bound by the conditions thereby imposed. By the statute 3 *Geo.* 4, c. 39, a true copy of the *cognovit*, and an affidavit of the time of the execution thereof, must be filed with the clerk of the dockets within twenty-one days after its execution; so, the day of signing judgment must be inserted on the margin of the roll (*c*); and here, as the judgment could not have been entered up during the life-time of the defendant, it ought not to be enforced against his executors.

Lord Chief Justice *BEST*.—This is an application to set aside a judgment, and execution which has been sued out thereon, at the instance of the plaintiff, against the defendant, and which, it has been contended, is irregular,

(*a*) *Hamley v. Allaston*, 3 B. Moore, 606.

(*b*) 2 *Ld. Raym.* 766—850.

(*c*) See *Tidd's Forms*, 6 Edit. 186.

the defendant having died before the judgment was entered up. By the law, as it now stands, a *cognovit* is revoked by the death of the party, although no good reason can be assigned for it, as he has nothing more to do after it is given, which distinguishes it from the case of a submission to arbitration, where, if one of the parties die before the award is made, the arbitrator cannot afterwards proceed to make an award, on the ground that his authority is thereby determined. That, however, may be now guarded against by an agreement between the parties submitting, and a clause to that effect may be inserted in the order of reference, or in the rule of Court (a). But the Courts have long since determined that a judgment at common law has relation back to the first day of the term of which it is entered up, and that, if a defendant die in vacation, judgment may be entered up after his death, as of the preceding term; and that fiction of law, being in furtherance of justice, must now prevail. The principle is confirmed in the case of *Bragner v. Langmead*, where the Court of *King's Bench* decided, that a judgment signed in any part of the term, or in the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and that an execution against the goods of the defendant might be taken out upon a judgment so signed, tested on the first day of the term. So, in *Waghorne v. Langmead*, where the plaintiff had obtained judgment, and a *fieri facias* was sued out thereon, tested before the defendant's death, although not delivered to the sheriff to be executed until afterwards—this Court held, that the execution was regular, and that it was not necessary to revive the judgment by *scire facias*, as it did not appear that the process had issued after the death of the parties. These authorities are directly in point. But it has been objected by my brother *Wilde*, that, ac-

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(a) See *Macdougall v. Robertson* (in error), 1 Moore & Payne, 147.

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According to the terms of the *cognovit*, the plaintiff could not have caused judgment to be entered up, or execution issued, against the defendant, in his life-time, during that portion of the term which elapsed previously to his death; and he referred to *Tidd's Practice*, which, although that work cannot strictly be taken as an authority, appears to me to militate against the principle for which it was cited; for, knowing as we all do, the great industry of the writer of that excellent and valuable work, it may be inferred, that there is no authority to warrant the distinction as to whether or not the judgment could have been entered up during the life-time of the defendant: for none is cited. But it is immaterial to consider whether or not the defendant died before the judgment was actually signed, provided it were not entered up till the plaintiff had a right to do so: when done, it related back to a time prior to the decease of the defendant. That is all that the law and forms require; and, as the judgment was not entered up, nor the money levied under the execution, until after the period at which, by the terms of the *cognovit*, the debt and costs were to have been paid; and, as the judgment, when entered up, had relation to the first day of the term in which the *cognovit* was given, and before the death of the defendant, it appears to me that the proceedings have been regular.

Mr. Justice PARK.—I am of the same opinion. The cases of *Bragner v. Langmead*, and *Waghorne v. Langmead*, to which my brother Cross referred us, appear to me to be decisive of the question. No doubt, the judgment had relation to the first day of the term in which the *cognovit* was given, which was anterior to the defendant's death. So, the teste of the writ on which the execution was sued out, referred to a day previous to such death; and the case of *Waghorne v. Langmead* is an express authority to shew, that, if a writ be not executed un-

til after the death of the defendant, yet, if it were tested previously to his decease, the execution is regular.

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Mr. Justice BURROUGH.—The debt was ascertained in the life-time of the defendant, and it was agreed, that, if it were not paid on or before the 1st of *April*, judgment was to be entered up. The clear and evident meaning of the parties was, that, if default were made in payment on that day, the plaintiff might enter up judgment, and sue out execution thereon; and, as the judgment, when signed, had relation to the first day of the term in which the defendant gave the *cognovit*, and the *fiery facias* was tested of a day in that term previously to his death, I am clearly of opinion that there is no ground for setting them aside.

Mr. Justice GASELEE.—It appears to me that the judgment and execution in this case are perfectly regular. In *Wyborne v. Ross*, this Court took a distinction between a *cognovit* and a warrant of attorney, and said, that, “where a man acknowledges the cause of action, the plaintiff may sign judgment at any time.” When an application is made to enter up judgment on a warrant of attorney, the Courts require an affidavit to be made, shewing that the party is alive within the term in which the application is made; and they would not allow judgment to be entered up, if they found that the defendant was dead. But, if a party confesses an action, and gives a *cognovit*, the plaintiff does not require the authority of the Court to enter up judgment; and here, although judgment was not to be entered up unless default were made in payment on a particular day, which was after the term in which the *cognovit* was given, yet, as the judgment had relation to the first day of that term, when the defendant was alive, there is no ground for the application.

Rule discharged, with costs.

1828.

Saturday,
June 7th.

This Court has no power to compel assignees of a bankrupt to enter of record the proceedings under the commission, in order to make them admissible in evidence under the 96th section of the statute 6 Geo. 4, c. 16. The application for that purpose must be made to the Lord Chancellor.

JOHNSON *v.* GILLET and Others.

MR. Serjeant *Wilde* applied for a rule *nisi* to compel the defendants, assignees of a bankrupt, to enrol the proceedings under the commission, pursuant to the statute 6 Geo. 4, c. 16. He founded his motion on an affidavit which stated, that the plaintiff had applied to the defendants, as assignees, to register the proceedings, or cause them to be enrolled; that they had refused to do so; and that, until they were entered of record, the plaintiff could not produce them in evidence, by virtue of the 96th section of the statute (a). The learned Serjeant submitted,

(a) The 95th section, enacts, "That all things done pursuant to the act passed in the fifth year of King *George* the Second *, and hereby repealed, whereby it was enacted, that the Lord Chancellor should appoint a place where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed, and the Lord Chancellor shall be at liberty, from time to time, by writing under his hand, to appoint a proper person, who shall, by himself, or his deputy (to be approved by the said Lord Chancellor), enter of record all matters relating to commissions, and have the custody of the entries thereof; and the person so to be appointed, and his deputy, shall continue in their respective offices so long as they shall respectively behave themselves well, and shall not be removed, except by order

in writing under the hand of the Lord Chancellor, on sufficient cause therein specified."

The 96th section enacts, "That, in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any Court of law or equity, unless the same shall have been first so entered of record as aforesaid. Provided that, on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon purporting to be signed by the person so appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record as aforesaid."

* Cap. 30, s. 41.

that it was the duty of the defendants, as assignees, to cause the proceedings under the commission to be entered of record, and that this Court had jurisdiction to compel them to do so, on the same principle as they might require a party to produce a written instrument for the purpose of getting it stamped, in order to render it admissible in evidence at the trial (*a*).

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But the Court were clearly of opinion that they had no power to interfere, and said that, as, by the 95th section, it was provided, that the Lord Chancellor should appoint a place where all matters relating to commissions should be entered of record, and also appoint a proper officer (*b*) to make such entries; and as, by the 96th section, the certificate of the entry was directed to be received as evidence of an instrument's having been entered of record, without proof of the signature of the officer, the proper mode of proceeding was, by petition to his Lordship.

Rule refused.

(*a*) See *Bateman v. Phillips*, 4 Clerk of the Enrolments—See Taunt. 157. Eden's Bankrupt Law, 2nd Edit.

(*b*) This officer is called the 353.

LAWRENCE v. HOOKER.

Saturday,
June 7th.

A RULE was applied for by Mr. Serjeant *Wilde*, calling on the defendant to shew cause why he or his attorney should not produce to the commissioners of stampduties a certain authority or agreement in writing entered into with the defendant, by one *Robert Jee* (by virtue of which certain goods and chattels of *Jee* were released from a distress then levied upon them by the defendant,

In trover for taking the plaintiff's goods, the Court refused to compel the defendant to produce an agreement entered into between the defendant and *J. T.*, for the purpose of getting it stamped, on the affidavit

of the latter, stating that the plaintiff's goods were taken under a distress levied at the instance of the defendant on him, *J. T.*; and that the goods of the latter (which were released by the agreement) were sufficient to satisfy the distress.

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on certain conditions therein named), in order that the agreement might be stamped and given in evidence at the trial; and that, in the meantime, all further proceedings in the cause might be stayed.

The motion was founded on affidavits, which stated, that the action (trover) was brought to recover damages for the collusive conversion and detention by the defendant of a horse and harness, the property of the plaintiff, under colour of a distress for rent owing to the defendant from *Jee*; that a certain memorandum or agreement in writing was entered into between *Jee* and the defendant, which was not stamped, and which was in the hands of the defendant or his attorney; and that the plaintiff could not safely proceed to the trial without producing or giving the memorandum in evidence, properly stamped.—*Jee* also deposed, that, on the 20th *August*, 1827, he entered into an agreement with the defendant, authorizing the latter to remain in possession of certain household goods and effects distrained on by the defendant for rent due to him from *Jee* (under which distress the horse and harness of the plaintiff had been taken), for a time beyond the period limited by law for the condemnation of such distress, upon certain conditions in the agreement named, whereby the plaintiff's horse and harness became liable to the distress, and were taken and condemned, instead of the said goods and effects of *Jee*, which would have been sufficient to satisfy the distress and rent due from him to the defendant.

Under these circumstances, the learned Serjeant submitted, that the plaintiff was entitled to have the agreement produced, for the purpose of its being stamped, which the defendant had refused, well knowing that the plaintiff must be nonsuited if it were found not to be properly stamped when called for at the trial. He cited *Bateman v. Phillips* (a),

(a) 4 Taunt. 157.

where the Court, on the application of the plaintiffs, compelled a defendant to produce an unstamped agreement which was in his custody, and to which the plaintiffs claimed to be parties in interest, in order that they might get it stamped; although they had not signed the instrument, and their interest only appeared on their own declaration, which merely proved a claim, not an interest; and he contended, that, although the Court will not in general oblige a defendant to produce a written instrument, in his possession, for the purpose of its being inspected or copied, unless it be deposited with him as a trustee for other parties interested; yet, as the plaintiff's object was merely to procure the agreement to be stamped, as he could not safely proceed to trial without it, and it could not be admitted in evidence unless properly stamped, they might exercise their discretion in granting the application.

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Lord Chief Justice BEST.—I am of opinion, that we ought not to interfere so as to affect the rights or liabilities of third persons. The case of *Bateman v. Phillips* somewhat extended the rule that had previously been acted on by the Courts, as to requiring a party to produce a written instrument in his custody for the purpose of getting it stamped. Here, the plaintiff complains that the defendant has taken his property under a distress for rent due to him (the defendant) from *Jee*. If the plaintiff wishes to procure the agreement, he must apply to a Court of Equity; but it would be too much for us to interpose to determine as to the equitable rights of the defendant and *Jee*.

Mr. Justice GASELEE.—The plaintiff might say that the agreement between the defendant and *Jee* was illegal and fraudulent, and that the getting it stamped might make them responsible, as it would be thereby rendered available against them; and, if they had discovered that the

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agreement was illegal, they might have abandoned it altogether, or declined to act upon it. At all events, the plaintiff can only obtain relief by an application to a Court of Equity.

Mr. Justice PARK, and Mr. Justice BURROUGH concurring—

Rule refused.

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The plaintiff was possessed of a chapel, which he assigned, together with all his other property, to a trustee, for the purpose of paying off debts and incumbrances. The trustee took possession of the property under the conveyance, and the defendants, as his servants, broke and entered the chapel, the key being in the possession of the plaintiff, who occasionally preached there:—*Held*, that the mere possession of the key did not give the plaintiff such a right of possession of the chapel as to enable him to maintain trespass.

Quere—whether a blank left in a deed, to be filled up after its execution, with the consent of the party conveying, does not vitiate the conveyance?

REVETT v. BROWNE, GOOCH, and CHAPMAN.

THIS was an action of trespass. The first count of the declaration stated, that, on the 1st *January*, 1826, and on divers other days before the commencement of the suit, the defendants broke and entered a certain messuage of the plaintiff, and forced and broke open the doors thereof, and took them away, and converted them to their own use. The second count was for breaking and entering a certain other messuage of the plaintiff, and expelling him from the use, possession, and occupation thereof.

The defendants pleaded,—*first*, not guilty,—*secondly*, that the messuages in the first and last counts of the declaration mentioned were the messuages, soil, and freehold, of one *Thomas Hudson*; wherefore the defendants, as his servants, and by his command, at the said time when &c., broke and entered the said messuages, so being his messuages, soil, and freehold.

The plaintiff added a *similiter* to the first plea, and newly assigned—that the messuages in the first and last counts of the declaration mentioned were certain messuages abutting &c. (here the abuttals were set out), and were other and different messuages from those in the defendant's last plea mentioned, &c.

The defendants pleaded not guilty to the new assignment; on which issue was joined.

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At the trial, before Mr. Baron *Garrow*, at the last *Summer Assizes*, at *Bury St. Edmunds*, it appeared that the plaintiff had, in 1823, built a chapel on certain waste land on his estate in *Suffolk*, and that the defendants broke it open, upon which the present action was brought; that the plaintiff, being in embarrassed circumstances, in *November*, 1825, executed deeds of lease and release (and also a deed of trust), by which he conveyed all his estates in *Suffolk* to one *Hudson*, upon trust to sell, and, out of the produce, to pay a debt due to one *Mills*, as also certain incumbrances, the surplus being to be paid to the plaintiff; that the deeds were executed by the plaintiff in the *King's Bench* prison, whilst he was in confinement there at the suit of *Hudson* and *Mills*; and that a blank was left in the deed of trust for the insertion of the sum due to *Mills*: which blank was afterwards filled up with the sum of 14,858*l.* 8*s.* 8*d.* It also appeared that *Hudson* obtained possession of the plaintiff's property under these deeds, and that *Mills* procured the key of the chapel, which he gave to a person to whom the plaintiff paid two shillings a week for keeping the chapel clean; that this person lent the key to preachers of different persuasions; that the plaintiff occasionally preached in the chapel, and was the last person who officiated there; and that he afterwards refused to return it, on demand made by *Browne*, who acted as the attorney of *Hudson*; whereupon the defendant *Chapman*, under *Brown's* direction, broke open the chapel.

For the plaintiff, it was contended, that the deeds by which his property was conveyed to *Hudson*, were void, by reason of the insertion of the sum due to *Mills* after they were executed; and also that they were obtained from the plaintiff by covin and fraud.

The learned Baron left it to the Jury to say, whether or not the plaintiff had a sufficient possession of the chapel, at the time the trespass in question was committed, to enable him to maintain this action; and he observed, that it was

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not for them to determine whether or not the deeds had been obtained from the plaintiff by fraud, it being the province of a Court of Equity to decide that question. It appearing, however, that the defendant *Gooch* had not taken any active part in breaking open the chapel, but had only occasionally preached there, and was present at the time, the Jury, under the learned Judge's direction, found a verdict for him; and for the plaintiff against *Brown* and *Chapman*,—damages, *forty shillings*.

Mr. Serjeant *Storks*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside, and a nonsuit entered, on the ground that the plaintiff had not such a possession of the chapel as to enable him to maintain trespass, the title being in *Hudson*, to whom the plaintiff's property was conveyed by the deeds, and under whose authority the defendants acted in breaking open the door of the chapel.

Mr. Serjeant *Wilde* now shewed cause.—The deeds in question were void, having been obtained from the plaintiff whilst he was under duress, and the amount alleged to be due from him to *Mills* being left in blank at the time the deed of trust was executed. Neither of the deeds, therefore, could be rendered available to *Hudson* by the blank being afterwards filled up. It did not appear at the trial by whom or when the sum was inserted. It was, at all events, a material alteration, and had the effect of vitiating one of the deeds altogether; and, although the blank might have been left with the knowledge of the plaintiff, and the insertion of the sum said to be due to *Mills* afterwards assented to by the plaintiff, still that could not cure the defect. In *Buller's Nisi Prius*, it is said (a), “If a deed contain divers distinct and absolute covenants, if

(a) 7th Edit. by Bridgman, 172.

any of them be altered, by additions, interlineations, or rasure, this misfeasance *ex post facto* avoids the whole deed." The defendants had no interest in the chapel, and the plaintiff had, at all events, a sufficient possession to maintain trespass against them. They have merely pleaded not guilty to the new assignment, which cannot entitle them to justify the breaking and entering the chapel by the command of *Hudson*. As, therefore, the defendants had no title, they must be considered as wrong doers. Even *Hudson* himself had no interest, as none of the plaintiff's property was conveyed to him by the deeds. The question as to possession was properly left to the Jury, and there is no ground to disturb the verdict.

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Mr. Serjeant *Storks*, in support of his rule.—There is no pretence for saying that any fraud has been effected, or was contemplated by either of the parties at the time the plaintiff executed the deeds by which he conveyed his property to *Hudson*. The plaintiff's legal estate passed to *Hudson* by the deeds of lease and release, as they gave him a power to sell, and to appropriate the proceeds to the payment of the plaintiff's creditors, of whom *Mills* was the principal. It was, therefore, immaterial whether the deed of trust was executed or not, as it was merely confirmatory of the former deeds. The plaintiff did not deny that *Mills* was his creditor; and, as the extent of his demand was not ascertained when the deeds were executed, a blank was left for the amount, with the assent of the plaintiff, and at his particular request. It is, therefore, futile to say that the deeds are void on the ground of fraud. In *Doe d. Lewis v. Bingham* (a), a mortgagee by deed conveyed the legal estate to the mortgagor, upon being paid the mortgage-money, and the latter re-conveyed it to trustees for the purpose of securing

(a) 4 Barn. & Ald. 672.

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an annuity. At the time of the execution by the mortgagee, there were several blanks left in the deed for the sums to be received by the mortgagor from the grantees of the annuity, which were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed after the execution by the mortgagee: and it was held that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. Here, the defendants entered the chapel by the command of *Hudson*, who had the legal estate. They must, therefore, be considered as his agents; and, as the key of the chapel was given to *Mills*, and by him deposited with his gardener, who merely lent it to the plaintiff for the purpose of preaching in the chapel, which others were in the habit of doing, the plaintiff had not such an exclusive right of possession as to enable him to maintain this action.

Lord Chief Justice BEST.—If it were necessary for us to decide whether or not the deeds conveyed a title to *Hudson*, under whose authority the defendants acted, so as to negative the plaintiff's right of possession, and, consequently, his right to maintain this action, I should have desired time to consider. I do not, however, think it necessary for us to touch that question. I am clearly of opinion that the plaintiff had not such a possession as would entitle him to maintain trespass. Possession alone will certainly entitle a party to maintain trespass as against a wrong doer; but it must be a clear and exclusive possession. Now, the plaintiff in this case had not such a possession. It appears that he had built the chapel, and for a certain period might have had the exclusive possession of it. Had there been no evidence to shew, that, at a subsequent time, other transactions had taken place, changing the aspect of affairs, this would have sufficed to warrant the Jury in finding the

possession to be in him. But it appears, that, after the conveyance by the plaintiff to *Hudson*, a gardener kept the key of the chapel, which was delivered to him, not by the plaintiff, but by *Mills*; and the evidence of this person went to shew, that, when the plaintiff had the key (which was only occasionally), it was not delivered to him as a symbol of possession, but merely to enable him to enter the chapel to preach. If that could be considered a sufficient possession, any person who is permitted to preach in a church or chapel, even for one day, might be said to have possession of it. But I am of opinion that the plaintiff had not such a possession as would entitle him to maintain trespass. To do so, it was necessary that he should have at least a clear right of possession against all the world, except the true owner. Now, the plaintiff never had such a right; and, certainly, not a sufficient possession at the time the alleged trespass was committed, to enable him to maintain this action. I, therefore, think, that the rule for a nonsuit must be made absolute.

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Mr. Justice PARK.—I am of the same opinion. Considering the nature of the tenure of the chapel, and the purposes for which it was used, one cannot well come to a different conclusion. Had the plaintiff regularly and exclusively used the chapel himself, and always kept the key in his possession, for the purpose of preaching there, the case would have been otherwise; but it appears that the chapel was open to any one who chose to preach in it; and there was no exclusive possession in the plaintiff even for that purpose: the chapel was open to all descriptions of persons. Under these circumstances, I am clearly of opinion, that there was not sufficient evidence to go to the Jury, of the plaintiff's having such an exclusive possession as to entitle him to maintain this action.

Mr. Justice BURROUGH.—I think my brother *Garrow*

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ought to have nonsuited the plaintiff, as there was no evidence of possession in him.

Mr. Justice GASELER.—It does not appear that any rent was ever paid to the plaintiff for the chapel, or that he derived any interest from the letting of the seats or pews, or in any other manner interfered with its internal management. The key was left by *Mills* with the gardener, who admitted any person, of whatever sect or denomination, to preach there, and the plaintiff paid this man two shillings *per week*, as a gratuity or fee for his trouble in keeping the chapel in a clean state; and others who were in the habit of preaching there, might have done the same.

Rule absolute, for a nonsuit.

Monday,
June 9th.

In a joint action of trespass against several defendants, there cannot be a nonsuit as to one, and a verdict against the others.

Mr. Serjeant *Wilde* now submitted, that, the Jury having found a verdict for one of the defendants, there could not be a nonsuit. And he referred to *Tidd's Practice* (a), where it is said, that, "in a joint action against several defendants, the plaintiff cannot be nonsuited as to one of them only; and, therefore, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict, if the plaintiff fail to make out his case."

In this the Court acquiesced, and directed a new trial, and ordered the rule to be altered accordingly.

Rule absolute, for a new trial.

(a) Vol. 2, 7th Edit. 895.

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WHALE v. LENNY and Others.

THIS was an action of covenant, brought by the plaintiff, as reversioner, against the defendants, as assignees of a bankrupt. The declaration stated, that the plaintiff was seised in fee in reversion, and assigned for breaches,—*first*, non-payment of rent;—*secondly*, that the bankrupt permitted the premises demised to be out of repair;—*thirdly*, that he dug up a bowling green, contrary to his covenant;—and *lastly*, that he had injured the premises by pulling down shelves and other articles belonging to the dwelling-house. The plaintiff excused *profert* of the lease on which the action was brought, alleging that it was in the possession of the defendants, as assignees.

In an action by a reversioner against assignees of a bankrupt for several breaches of covenant in a lease, the Court refused to allow the defendants to plead *non est factum*, and also that the premises did not come to them by assignment.

Mr. Serjeant *Jones*, on the first day of this Term, obtained a rule *nisi* to plead several matters, *viz.*—*first*, *non est factum*;—*secondly*, that the lease or deed was not in the possession of the defendants;—*thirdly*, that the premises did not come to the defendants by assignment;—and *lastly*, that the bankrupt had performed all the covenants on his part to be performed and fulfilled, according to the terms of the lease.

The learned Serjeant now applied to make the rule absolute, and submitted, that these pleas might well stand together, as they were not inconsistent with each other; that the defendants, as assignees, had their election to accept the lease or not; and that they were not bound to take what Lord *Kenyon* termed a *damnosa hæreditas*, as the lease might be a burthen rather than a benefit to the bankrupt's estate.

But the Court said, that the pleas of *non est factum*,

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and, that the premises did not come to the defendants by assignment, ought not both to stand.

The learned Serjeant, therefore, consented to withdraw the former; and on these terms the rule was made—

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In a question of pedigree, declarations of a party connected by marriage are receivable in evidence. Therefore, in an action of ejectment, declarations by a woman, that her first husband used to say that the estate would go to *J. F.*, and, after his death, to his heir (under whom the lessor of the plaintiff claimed), were held to be admissible in evidence to shew the relationship and affinity of *J. F.* to the lessor of the plaintiff.

DOE on the demise of SAMUEL FUTTER v. RANDALL.

THIS was an action of ejectment.—At the trial, before Lord Chief Baron *Alexander*, at the last *Summer Assizes* at *Norwich*, the lessor of the plaintiff claimed as cousin and heir-at-law of one *John Futter*, who was seised, and in possession, of the premises sought to be recovered by this action, and who died so seised in 1769. It appeared, by the plaintiff's pedigree, that *John Futter*, the ancestor, left a son *James*, who had issue a son *James*, whose eldest son was *Samuel*, under whom the lessor of the plaintiff claimed. The defendant was in possession under the person last seised, who claimed under *Richard*, the brother of *John Futter*.

For the lessor of the plaintiff, a witness stated, that he remembered *John Futter*, who was a wholesale tailor; that he left a widow, who married a person named *Edwards*, twenty-eight days after her first husband's death; that she died twenty-eight years since; and that he, *Edwards*, was buried about fifty-eight years ago. Another witness (*James Chapman*), aged eighty-two, son of *Ann Futter* by *Chapman*, said, that he had heard his uncle *James* talk of the father of *John*; that he knew *John*, but did not know where he lived; that his uncle *James* lived at *St. Faith's*, and that he had heard him speak of a cousin, but did not recollect his christian or surname, nor where he lived; that he had heard *James Futter*, his uncle, say that *James*

Futter of *Vintry* was the cousin of *John*, who had the estate at *Cawston*; that *James Futter* of *Cawston* was the son of witness's uncle; that *James* of *Vintry* had two sons, *Samuel* and *James*; that *Samuel* had been dead some time, but that witness did not know what children he had. A third witness (*Elizabeth Cooper*) said, that she knew *Mrs. Edwards*; that her first husband was *John Futter*; that she said that *James Futter* was to have the estate; that *John*, her husband, used to say, that the estate would go to *James Futter*, and, after his death, to his heir; that *Mrs. Edwards* also said, that her first husband told her on his death-bed that the estate would go into the family of the *Futters*, and that it was *Futter* of *Vintry* who was to succeed. Two other witnesses swore that they knew *James Futter* of *Vintry*, and had often heard him say that he was cousin to *John Futter* of *Cawston*, the wholesale tailor, who had the estate; and that, after the decease of *Mrs. Edwards*, the estate would come to him; that *James* of *Vintry* left two sons, *Samuel* and *James*; that *Samuel* was the eldest, and died, leaving a son named *Samuel*, who was married. The Jury found a verdict for the plaintiff.

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Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside and a new trial granted, on the grounds,—*first*, that the verdict was not warranted by the evidence, as it was not shewn that *James Futter*, under whom the lessor of the plaintiff claimed, was descended from or related to *John Futter*, the ancestor;—*secondly*, that the declarations stated by the witnesses, *Chapman* and *Cooper*, to have been made by *James* and *John Futter*, and particularly by the latter, ought not to have been received in evidence. *Chapman's* testimony only went to prove that he had heard his uncle *James* talk of the father of *John*; but not that *James* was descended from him. For aught that appeared to the contrary, he might have belonged to another family of

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the name of *Futter*. In the case of the *Berkeley Peerage* (a), Lord *Eldon*, after referring to the case of the *Banbury Peerage*, said (b), that in that case, as the depositions under the bill to perpetuate testimony contained many statements with regard to pedigree, a question was put to the Judges, whether, if they could not be received as depositions, they could be received as declarations. The Judges thought that, at all events, the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions, were *aliunde* proved to be relatives; and that there was no such evidence.

The only material witness was Mrs. *Cooper*; and what Mrs. *Edwards* told her, as to what her first husband, *John Futter*, used to say, ought not to have been received; or, at all events, his declarations were not sufficient to shew that *James*, under whom the plaintiff claimed, was the descendant or heir-at-law of the above-named *John Futter*.

Mr. Serjeant *Storks* now shewed cause.—The plaintiff made out a sufficient title to prove his pedigree, and to maintain this action; and the Lord Chief Baron has not expressed any dissatisfaction with the verdict. The defendant claimed as a branch of the same family of the *Futters* under whom the lessor of the plaintiff claimed to be entitled, *viz.* the brother of *John*; and the testimony of the witness *Chapman*, coupled with that of Mrs. *Cooper*, is decisive to shew that *James Futter* was heir-at-law of *John*, the original purchaser. Although *Chapman* might have given his testimony in a confused manner, from age or infirmity, yet he was corroborated by others, and the whole of the evidence was left to the Jury. The declarations of *John Futter*, that *James* and his heir would have

(a) 4 Camp. 401. (b) *Id.* 419; Starkie on Evidence, Vol. 3, p. 1112.

the estate, were conclusive of the question; and, although it has been said that such declarations ought not to have been received, yet in *Vowles v. Young* (a), hearsay evidence of declarations, made by a deceased husband, as to the legitimacy of his wife, were held admissible in evidence, although he was not related to her by blood; on the ground, that a husband must be supposed to have more intimate knowledge on that subject than a distant relation. That principle has never been shaken, and the present case must be governed by it. The declarations of *John Futter* were only used to shew the identity of *James*, and that he was descended from him.

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Mr. Serjeant *Wilde*, in support of his rule.—The defendant claims as heir-at-law of the person last seised of the estate in question, who was descended from *Richard Futter*, the brother of *John*. Although the plaintiff's witnesses said that they had heard that *James Futter* was the cousin of *John*, yet neither of them proved that he was a relation of the present claimant, or that he was of the same family. *James* might have been a relative, but it does not follow that he was heir-at-law; and though the declarations made by Mrs. *Edwards* to *Elizabeth Cooper*, that *James Futter* was to have the estate, might be evidence, yet those of her husband certainly ought not to have been received; and she did not prove that her husband had said that *James* was the heir of *John*, but only that a *James Futter* was to have the estate. On the whole, therefore, there was not sufficient evidence to go to the Jury to establish the plaintiff's claim as heir-at-law of *John Futter*, the original purchaser of the estate.

Lord Chief Justice BEST.—This is an application for a new trial, and we are bound to suppose that every objec-

(a) 13 Ves. 140.

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tion and observation as to the admissibility or effect of the evidence tendered for the plaintiff at the former trial was made by the counsel for the defendant, and attended to by the Judge, and that the whole of the plaintiff's evidence was left to the Jury; and it appears to me that they have drawn a right conclusion. They were satisfied that the family of the *Futters*, under whom both parties claimed, was one and the same family, and the plaintiff was entitled to shew that *James* was a member of that family. If not, it is quite clear that the declarations now objected to could not have been received in evidence. They were admitted, not for the mere purpose of shewing that he was connected with the family, but that he was a member of it. If, however, there were no other evidence than the declarations of *John*, to shew that *James* was a member of the family, they could not have been received, as that would be carrying the rule as to the admissibility of hearsay evidence further than has been ever yet done, *viz.* to allow a party to claim an alliance with a family by the bare assertion of it. But it appears to me that there was other satisfactory evidence in this case to shew that *James* of *Vintry* was a member of the *Futter* family; and there was no evidence to shew that there were two families of that name; and, even in the defendant's pedigree, the name of *James Futter* is introduced as being descended from *John*. Laying that aside, however, it is necessary to look at the testimony of Mrs. *Cooper*: she said that she knew Mrs. *Edwards*, whose first husband was *John Futter*, under whom the lessor of the plaintiff claimed; that she (Mrs. *Edwards*) said that *James Futter* was to have the estate, and that *John Futter*, her husband, used to say that the estate would go to *James Futter*, and, after his death, to his heir. That was evidence to shew that *James* was a relation; and, putting out of the question what *John* said as to the estate descending to the heir of *James*, still his declarations, as to the latter being related to the family, were admissible

and properly received. So, the witness *Chapman*, although he was eighty-two years of age, might have had his recollection called to certain facts with respect to *James Futter*; for a person at an advanced age frequently remembers circumstances which passed in his early days, although he may have but a faint or imperfect recollection of more recent occurrences. He said that *James Futter* of *Cawston* was a relation of the family, *viz.* the son of his, the witness's, uncle. It must be admitted, after the case of *Vowles v. Young*, that the declarations of a party connected by marriage are receivable in evidence. Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is become a member, than a relation who is only distantly connected by blood; as, by frequent conversation, the former may hear the particulars and characters of branches of the family long since dead: and, if such a party, on cross-examination, were questioned as to declarations made by a person deceased, although he did not hear them himself, it would be sufficient for him to state that he had heard his relations say that the deceased declared who and what his cousins or other relatives were. Although hearsay evidence is only admissible on questions of pedigree or prescription, yet it is absolutely necessary in such cases, as the facts cannot be proved by living witnesses in the ordinary manner. Still, the declarations of deceased parties must be taken with all their imperfections; and, if they appear to have been made honestly and fairly, they are receivable. If, however, they are made *post litem motam* they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiassed opinion. Here, however, I am of opinion, that the testimony of *Mrs. Cooper*, as to the declarations made by *John Futter*, the first husband of *Mrs. Edwards*, that *James*

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Futter was to have the estate, was admissible to shew his relationship to the family, and lets in the account given of that person by *Chapman*, one of the other witnesses. Considering, therefore, that this evidence was admissible, and coupling it with the other testimony in the cause, I am of opinion that the plaintiff's pedigree was satisfactorily proved, and, consequently, that the Jury were fully warranted in finding a verdict for him.

Mr. Justice BURROUGH (a).—It does not appear, from the report, that any objection was taken to the competency of either of the witnesses tendered for the plaintiff. I was one of the counsel in the case of *Vowles v. Young*, which appears to me to be in point. There, one *Thomas Roberts* said, that he had heard *Samuel Noble*, the husband of *Mary Noble*, say that she was illegitimate; and it was held, that the declarations of *Noble* were admissible; and the Lord Chancellor (*Erskine*) said (b): "Upon questions of pedigree, inscriptions upon tomb-stones, and engravings upon rings are admitted." (c) "The law resorts to hearsay of relations, upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says, another is his relation or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says *A.* is his relation, without stating the particular degree; which, perhaps, he could not tell, if asked. But it is evidence, from the interest of that person in knowing the connections of the family." As, therefore, in this case, the declarations of *John Futter*, that *James* was to have the estate, were corroborated and confirmed by the testimony of *Chapman*, I am of opinion, that there is no ground to disturb this verdict.

(a) Mr. Justice *Park* was at Chambers. (b) 13 Ves. 144. (c) *Id.* 147.

Mr. Justice GASELEE.—I was at first inclined to think that the objections raised by my brother *Wilde* were well founded; but, in *Doe d. Northey v. Harvey* (a), the declarations of the late husband of one of the family were held to be admissible in order to prove a pedigree, although he was not otherwise related to the family; Mr. Justice *Littledale* thinking, that, for the purpose for which the declarations by the husband were offered, he must be considered as one of the family. That case appears to me to be in point to shew that no improper evidence was received at the trial of this cause, and that the Jury were warranted in finding a verdict for the plaintiff. This rule, therefore, must be—

Discharged (b).

(a) 1 Ry. & Mood. 297. (b) See *Johnson v. Lawson*, 9 B. Moore, 183.

WOOD v. NUNN.

Monday,
June 9th.

THIS was an action of trover for a lathe.—At the trial, before Lord Chief Baron *Alexander*, at the last *Summer Assizes*, at *Cambridge*, it appeared that the plaintiff was lately in partnership with one *Saunders*, and that the lathe in question was used by them in the way of their business as machinists; that they had dissolved partnership; and that disputes having arisen between them, they were referred to an arbitrator, who awarded the lathe to be the property of the plaintiff; that the lathe was in *Saunders's*

The plaintiff was possessed of a lathe, which was in the shop of one S. The latter being indebted to his landlord (the defendant) for rent, and the plaintiff being about to remove the lathe (between six and seven o'clock in the morning), the defendant

interposed, saying, that "he would not suffer that, or any of the other things, to go off the premises till his rent was paid," and then left the shop. The plaintiff, however, removed the lathe, and about twelve o'clock the same day the defendant sent a broker to the premises to distrain, and followed and brought back the lathe that had been taken away. The plaintiff thereupon sued him in trover:—*Held*, that, the distress being commenced by the landlord's saying in the morning that he would not suffer the things to be removed until his rent was paid, and completed by the entry of the broker afterwards, the landlord had a right to take and bring back the lathe that had been carried away in the mean time.

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shop, which he rented of the defendant at the yearly rent of 15*l.*; that, on the 12th *May*, 1827, between six and seven o'clock in the morning, the plaintiff and three of his men went to the shop for the purpose of removing the lathe; that the defendant and *Saunders* came in, when the latter said, that he would die by the lathe rather than suffer it to be removed; upon which the defendant said, "I will not suffer this or any of the other things to go off the premises till my rent is paid,—there is two years due;" and he shortly afterwards left the shop. The plaintiff, however, succeeded in removing part of the lathe to an inn adjoining, and the other part to his own house; but the defendant shortly afterwards, *viz.* about twelve o'clock at noon on the same day, sent in his broker or bailiff, who made a formal distress of all the articles in the shop for the rent so due from *Saunders* to the defendant; and he afterwards went to the inn and seized the part of the lathe which the plaintiff had caused to be removed there, and brought it back with the other part to the shop.

For the plaintiff, it was contended, that there was no legal distress till the defendant sent in his bailiff at twelve o'clock on the 12th *May*, and that the lathe being the property of the plaintiff, and having been previously removed by him *bond fide*, and without fraud, the defendant had no right to follow and seize it, or order it to be brought back to the shop.

The Lord Chief Baron, however, was of opinion, that the distress was, in point of fact, commenced when the defendant said in the morning that the lathe should not go off the premises till his rent was paid, and that it was completed by the entry of the broker, when the distress was formally made; and, his Lordship said, that it would be a strange state of the law, if a landlord, finding goods on his premises about to be removed, could not stop them, and afterwards send in a broker to complete the distress; but that it would be a different question if there

were any fraud between the defendant and *Saunders* to defeat the plaintiff from taking the lathe, to which he was entitled by the terms of the award. The Jury found a verdict for the defendant.

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Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside and a new trial granted, on the grounds, that there were other goods on *Saunders's* premises which might have been distrained; and that, at all events, the defendant had no right to seize the lathe which had been removed previously to the entry of the broker, as the plaintiff was clearly entitled to it, and had not taken it away clandestinely or with a fraudulent intent.

Mr. Serjeant *Storks* now shewed cause, and contended, that there was no connivance between the defendant and *Saunders* to deprive the plaintiff of his property; and that, as two years' rent was actually due to the latter, he had a right to distrain all the articles found on the premises. The learned Serjeant was proceeding with his argument, when the Court called on—

Mr. Serjeant *Wilde* to support his rule. By the terms of the award, it is clear that the lathe was the property of the plaintiff, and he went to *Saunders's* shop for the purpose of removing it, which he was fully warranted in doing. *Saunders*, the tenant, had no right to detain the lathe, or obstruct its removal, in the first instance, nor was the defendant, as landlord, justified in seizing it or frustrating the plaintiff's purpose, as he was armed with no legal authority when the plaintiff first went to the shop in the morning; and it is obvious that the defendant did not then consider that any distress had been made, as he afterwards sent his broker, who gave *Saunders* the usual notice, and distrained accordingly. Although the pro-

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perty of a third person, if found on the premises of a tenant, is liable to be distrained for rent due to his landlord; still, if the landlord and tenant collude together, and wrongfully detain such property, or obstruct its removal before a distress is made, it cannot afterwards be taken; and here, as the lathe was actually removed by the plaintiff, to whom it belonged, before any distress was made, the case of a fraudulent removal by a tenant cannot apply, and the plaintiff is consequently entitled to recover.

Lord Chief Justice BEST.—If no rent had been due from *Saunders* to the defendant, or the landlord and tenant had fraudulently agreed to keep the property of the plaintiff until rent should accrue, the distress would have been unlawful, nor could the lathe have been detained. But that was not the case. The sum of 30*l.* was in fact due, and the defendant, as landlord, had a right to distrain in the first instance; and, without the lathe, there were not sufficient goods on the premises to satisfy the distress. Before the defendant came to the shop, the plaintiff and *Saunders* were disputing about the lathe, and the latter said that he would die by it rather than suffer it to be removed. He, therefore, claimed it for himself and not for his landlord, upon which the defendant said, “he would not suffer it to go off the premises till his rent was paid;” and, as landlord, he had a paramount right to it. But it has been said, that the lathe was removed before the commencement of the distress. If that were so, the plaintiff would have been entitled to recover. But that was not the fact; for the distress commenced when, in the morning, the defendant, as landlord, said that the lathe should not go off the premises till his rent was paid. That was, in point of fact, the levying of the distress; and, although an inventory was not then taken, or formal notice of distress given, yet the entry by the broker a few hours

afterwards, by whom a regular distress was made, had relation to what had been previously done by the defendant, and both together may be considered as one continuous act. The property was in the custody of the law from the time it was first claimed by the defendant, as landlord; and the lathe having been afterwards improperly removed by the plaintiff, the defendant had a right to get it back. I, therefore, think, that, under the circumstances, there is no ground to disturb the verdict, which was properly found for him.

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Mr. Justice PARK.—There was no collusion or fraud between the defendant, the landlord, and *Saunders*, the tenant. The former had a right to detain the lathe until his rent was paid; and the distress must be taken to have commenced when he made his demand, which was before any part of the lathe had been removed from the shop.

Mr. Justice BURROUGH.—In point of law, the distress commenced when the defendant, as landlord, said that he would not suffer the lathe to go off the premises till his rent was paid. The broker acted upon it a few hours afterwards. The defendant had a right to distrain in the first instance, for the rent due to him from *Saunders*; and it does not appear that he was privy to the disputes which had previously existed between the plaintiff and *Saunders*, as to whom the lathe belonged to.

Mr. Justice GASELEE.—It is not necessary to say what might have been the case, if *Saunders*, the tenant, had brought the lathe on the premises for the purpose of its being distrained, or it had been placed there without the consent of the plaintiff. It was on the premises on the morning of the day in which the defendant, as landlord, claimed it, and had been so a long time before; he was, therefore, entitled to distrain it. There was no evidence of collusion

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between the landlord and the tenant; and, as the plaintiff removed the lathe after the defendant had said that it should not go off the premises till his rent was paid; and it was proved that two years' rent was due, I am of opinion, that the plaintiff was not warranted in causing the lathe to be removed.

Rule discharged.

Tuesday,
June 10th.

In an action for a libel, the declaration, without any introductory averment to explain the libel, set it out as follows:

"Who do you think was the archbishop who promised the priest of the Mountains 1000*l.* in cash, and a living of 800*l.* a year? Why, no less a personage than the Archbishop of Tuam (the plaintiff)!!!"

The archbishop wrote to a protestant clergyman, desiring him to make the offer, and to shew the letter, but not to surrender it into his possession, unless *M.* was disposed to accede"—with an innuendo that "the defendant

meant by the libel, that the plaintiff had offered the said *M.* 1000*l.* in cash, and a living of 800*l.* a year, if he would accede to become a protestant clergyman." On motion in arrest of judgment, on the ground that there was nothing on the face of the libel, as set out in the declaration, to warrant the innuendo that the offer was made to induce *M.* to become a protestant clergyman:—*Held*, that the libel imputed immoral conduct to the plaintiff upon the face of it; and that, after verdict, the declaration was sufficient.

The Archbishop of TUAM v. ROBESON and THWAITES.

THIS was an action for a libel. The *first* count of the declaration stated,—That the plaintiff, before and at the time of the printing and publishing, &c., was, and from thence hitherto hath been, and still is, Archbishop of *Tuam*, in that part of the United Kingdom of *Great Britain and Ireland* called *Ireland*, to wit, at *Westminster*, in the county of *Middlesex*; that, before and at the time of the printing and publishing, &c., one *Thomas Maguire* acted as a priest of the Roman Catholic Church in *Ireland*, to wit, at &c. aforesaid; that the plaintiff had always well, duly, honorably, and lawfully conducted himself as such archbishop, in the due and proper discharge of his duty, and in the office and functions of such archbishop, and had never promised nor offered, nor desired to be promised or offered, to the said *Thomas Maguire*, or to any other person whatever, any reward, or any sum of money, in order to induce the said *Thomas Maguire*, or any other person, to cease to act as a priest of the Roman Catholic Church in *Ireland*, or to accede to become a protestant clergyman; and had never promised nor offered, nor desired to be promised or offered, to the said *Thomas Maguire*, or to

any other person acting as a priest of the Roman Catholic Church in *Ireland*, a living of 800*l.* a year, or any living whatsoever, in order to induce the said *Thomas Maguire*, or any other person, to cease to act as a Roman Catholic priest, or to accede to become a protestant clergyman; and had never promised or offered, nor desired to be promised or offered, to any person, any living, but in the due and proper discharge of his duty as such archbishop, which the plaintiff had, in all things, duly and properly discharged as aforesaid; whereby the plaintiff had, before and at the time of the printing and publishing of the several false, scandalous, and malicious libels thereafter mentioned, deservedly obtained a good name, fame, credit, and reputation, and the respect and good opinion of all those submitted to his charge, and of all the liege subjects of the United Kingdom, and, until the time of printing and publishing, &c., had never been suspected of any such conduct as aforesaid towards the said *Thomas Maguire*, or any other person whatsoever, to wit, at &c. aforesaid. Yet, the defendants, well knowing all and singular the premises, but contriving and maliciously intending, wrongfully and unjustly to injure the plaintiff in his aforesaid good name, fame, credit, and reputation, and in the respect and good opinion which he had obtained, and to bring him into public scandal and disgrace, and to cause it to be believed that he, the plaintiff, had misconducted himself as such archbishop as aforesaid, and had promised to the said *Thomas Maguire* a large sum of money, and a living of 800*l.* a year, and that the plaintiff had written to a protestant clergyman to make such offer, in order to induce the said *Thomas Maguire* to accede to become a protestant clergyman, did, on the 8th *November*, 1827, at &c. aforesaid, falsely, wickedly, and maliciously, print and publish, and cause and procure to be printed and published, in a certain newspaper, to wit, a certain newspaper called *The Morning Herald*, a certain false, scandalous,

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and malicious libel, of and concerning the plaintiff, and of and concerning the conduct of the plaintiff, and of and concerning the conduct of the plaintiff as such archbishop as aforesaid, and of and concerning the plaintiff's supposed offer to the said *Thomas Maguire* as aforesaid, containing therein the false, scandalous, malicious, and libellous matter following, of and concerning the plaintiff, and of and concerning the said conduct of the plaintiff as such archbishop as aforesaid, and of and concerning the plaintiff's supposed offer to the said *Thomas Maguire* as aforesaid, that is to say: "*Ireland, Dublin, November 5th.*—The speech of the Reverend Mr. *Maguire*, at the *Roscommon* Catholic Meeting, has excited a prodigious sensation. The second reformation did not need this last shock to destroy it; but, now that it has come, a vestige of the fabric does not remain. Who do you think was the archbishop who promised *Maguire*, the priest of the mountains, 1000*l.* in cash, and a living of 800*l.* a year? Why, no less a personage than the Archbishop of *Tuam*!!! This statement I received this day from Mr. *M.* himself. The archbishop wrote to a protestant clergyman, desiring him to make the offer, and to shew the letter, but not to surrender it into his possession, unless *Maguire* was disposed to accede; and the induction into the living was to take place within eight days. All these facts are capable of proof, and will be proved if their authenticity is denied. A writ has been served on him by a country inn-keeper, at whose house he resided for about three months, three years since, when he first took possession of his miserable parish, for the seduction of his daughter! As a proof of the fairness of the saints, it may be observed, that, with the 5,000 copies of the published report of the discussion between *Pope* and *Maguire*, which they printed, they have bound up Dr. *Otway's* *Strictures on the Arguments*!!! The report, it was understood, should go out on its own merits:"—meaning, by the said libel, that the plaintiff had offered the

said *Thomas Maguire* 1000*l.* in cash, and a living of 800*l.* a year, if the said *Thomas Maguire* would accede to become a protestant clergyman, to wit, at &c. aforesaid.

The *second* count set out a portion only of the above libel, commencing with the words, "Who do you think, &c.," and concluding with, "if their authenticity is denied;" with a like *innuendo*.

In the *third* count, the libel set forth was the same as in the *first*; and that set out in the *fourth* was the same as in the *second*; the inducement in each count stating, that the plaintiff was the Archbishop of *Tuam*, and that *Maguire* acted as a priest of the Roman Catholic Church.

In the *fifth* count, the inducement stated that *Maguire* was reputed to be a priest of the Church of *Rome*, and to act as such in *Ireland*. In the *sixth*, that the plaintiff had made the promise to *Maguire*, whom the defendants represented to be a priest of the Church of *Rome*. And, in the *seventh*, *Maguire* was not stated to be a priest: the libel in these last counts being set out at length, as in the *first* and *third*.

The defendants pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, the Jury found a verdict for the plaintiff—Damages, 50*l.*

Mr. Serjeant *Taddy* now moved in arrest of judgment.—*First*, it is not alleged in either of the counts of the declaration that *Maguire* was a priest, but merely that he acted as such; nor is it averred that any offer was made to him by the plaintiff whilst he was such priest: and the *sixth* count merely states, that the plaintiff had promised *Maguire*, whom the defendants represented to be a priest of the Church of *Rome*, a large sum of money and a living. Besides, there is no introductory averment by way of *colloquium*, that will tend to elucidate or explain the meaning of the supposed libel, which, therefore, rests solely upon its

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own intrinsic import, and, in fact, only amounts to this, that the plaintiff, as Archbishop of *Tuam*, had offered to *Maguire* 1000*l.* and a living of 800*l.* a year. It does not appear that the living was in the diocese of *Tuam*, or even in *Ireland*, or that it was an ecclesiastical benefice. For any thing that appears to the contrary, it might have been a living in *Canada*, where the Catholic is the religion established by our laws; nor does it appear that the offer was made to induce *Maguire* to accede to become a protestant clergyman; and, although that is introduced by way of general *innuendo* at the end of the first and subsequent counts, yet, there is no previous averment to which it can refer, nor any introductory statement explanatory of the alleged libel, to warrant such a supposition or conclusion. Further, there is no *colloquium* to shew what was meant by “the *Roscommon* Meeting,” or to what “the second reformation” might apply. There is, consequently, no cause of action disclosed on the face of the declaration; and, if the libel will not bear the meaning given to it by the *innuendo*, the declaration is altogether bad. The introductory statement merely consists of two facts, the one, that the plaintiff is Archbishop of *Tuam*, the other, that *Maguire* acted as a priest of the Roman Catholic Church in *Ireland*. The purport and object of the *Roscommon* Meeting might and ought to have been explained, as well as when and where it was held. In *Goldstein v. Foss* (a), which was an action for a libel, the declaration,—after reciting, that divers persons had been associated together, under the name of the “Society of Guardians for the protection of trade against swindlers and sharpers,” and that the defendant, under colour of being the secretary of the said society, had published certain printed reports, for the purpose of denoting to the members of the said society the names of such persons as were deem-

(a) 1 Moore & Payne, 402.

ed swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society,— set out the libel, of and concerning the plaintiff, as follows: “ Society of Guardians for the protection of trade against swindlers and sharpers. I (meaning the defendant) am directed to inform you, that the plaintiff and *J. S.* are reported to this society as improper to be proposed to be ballotted for as members thereof (thereby meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society);” and a Court of error was of opinion that the facts stated in the declaration were not sufficient for them to collect the true construction to be put on the libel, or whether, from its import, it could be made the subject of an action; and that the *innuendo* sought to extend and not to explain the natural meaning or import of the words of the libel: and Lord Chief Justice *Best*, in delivering the judgment of the Court, said(*a*): “ An *innuendo* is only explanatory of some matter already expressed, and cannot point out a new charge, or introduce a new fact, or add to, enlarge, or change the sense of previous words.” Here, the words of the alleged libel do not warrant the general *innuendo* that the plaintiff made the offer or promise to *Maguire*, if he would accede to become a protestant clergyman, without a previous allegation of such a fact, so as to connect it with the terms of the libel itself.

Secondly, Even supposing that the meaning attributed by the plaintiff to the libel be correct, still there is no imputation on the plaintiff of any base motive, or any turpitude of design or immoral conduct, in making the offer to *Maguire*. It does not appear that he was an improper person to have such an offer made to him. By several *Irish* statutes now in force (*b*), Catholic priests

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(*a*) 1 Moore & Payne, 413.

(*b*) Sec 2 Ann. c. 7, s. 2, and 19 & 20 Geo. 3, c. 39, s. 1.

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who become converts have certain annual sums of money provided for them; and the last act allows each of such priests 40*l. per annum*, until he shall be provided for by some ecclesiastical benefice or licenced curacy of the same or greater value: and these are not to be considered as mere isolated statutes. Although, in *Thorley v. Lord Kerry* (a), a distinction was taken between words that are written, and those that are merely spoken, as in *King v. Lake*, where Lord Chief Baron *Hale* said (b), “Although general words spoken once, without writing or publishing them, would not be actionable, but that being writ and published, which contains more malice than if they had but been once spoken, they were actionable;” yet, in that case, the distinction was not called for, as the libel imputed seditious language to have been used by the plaintiff; and it was alleged that he had sustained damage in his profession as a barrister. So, in *Thorley v. Lord Kerry*, the plaintiff was accused of having acted hypocritically and with the grossest impurity, by using religion as a cloak for unworthy purposes; whilst here, the writing complained of did not impute the slightest crime to the plaintiff, or that he had been actuated by dishonest or improper motives. On the contrary, his conduct was most praise-worthy in attempting to make a convert of a Catholic priest, which is fully sanctioned by law.

Lord Chief Justice BEST.—Probably this declaration would have been more correctly drawn, had it contained some averment by way of preliminary statement. But the question now is, whether, after verdict, enough appears on the face of the record to sustain the action. In the case of *Thorley v. Lord Kerry*, which came on in the Court of *Exchequer Chamber*, on a writ of error from the Court of *King’s*

(a) 4 Taunt. 355.

(b) Hardres, 470.

Bench, and to which we have been just now referred, Sir *James Mansfield* said (a): "I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. But the distinction between written and spoken scandal has been established by some of the greatest names known to the law, Lord *Hardwicke*, Lord *Hale*, Lord Chief Justice *Holt*, and others;" and Sir *James Mansfield*, in conclusion, said (b): "We cannot, in opposition to decided cases, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken." The main distinction between words spoken and words written, is, that whatever renders a man ridiculous, or tends to lower him in the estimation of the world, amounts to a libel when written, although the same words, if spoken, would not have been a defamation of him. So, there is a difference between the malignity and injurious consequences of slanderous words spoken and written, the one being sudden and fleeting, the other permanent, deliberate, and disseminated with greater ease. Again, in order to maintain an action for verbal slander, the words spoken must impute a crime; which is not necessary where the words are reduced into writing and published. So, an action may be maintained for a libel by which a party is accused of immorality or profligacy. Can we then collect, on the face of this record, any imputation of immoral conduct to the plaintiff? He is stated to have been the Archbishop of *Tuam* at the time of the publication; as such, he is a protestant prelate. *Maguire* is alleged to have acted as a priest of the Roman Catholic Church in *Ireland*. The nature or tendency of his speech at the *Roscommon* Meeting might have been explained at the trial. The declaration avers, that the defendant published the libel, of and concerning the plaintiff

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(a) 4 Taunt. 364, 365.

(b) Id. 366.

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as such archbishop, and of and concerning his supposed offer to *Maguire* as a Catholic priest; and the terms of the libel, as far as regards this offer, are these: "Who do you think was the archbishop who promised *Maguire*, the priest of the mountains, 1000*l.* in cash and a living of 800*l.* a year? Why, no less a personage than the Archbishop of *Tuam*!!! This statement (says the writer) I received this day from Mr. *M.* himself;" and he further says, "all these facts are capable of proof, and will be proved if their authenticity is denied." *Maguire*, therefore, is represented as having said that the plaintiff had offered him this sum and a living. For what purpose? Why, if he would change his faith; or, as stated by way of *innuendo*, if he would accede to become a protestant clergyman. By doing so, he must not only abandon his own religion, but necessarily become a hypocrite; and that, too, through a bribe offered him by the plaintiff. It is stated in the libel, that "the *induction* into the living was to take place within eight days." That shews that the living was a living in the Church of *England*, as the word induction is a term known in the law, and is the act of the bishop, by which a clergyman is introduced to his benefice or church. It is further stated, that "a writ had been served on *Maguire*, by an inn-keeper, for the seduction of his daughter." It must, therefore, be inferred that he was a profligate and unworthy person, and that he would be a disgrace to the character of a clergyman of any church, and yet, that he had been bribed to become one by the plaintiff, who had also endeavoured to induce him to change his faith. Can we not then collect sufficient from the facts set out in this declaration, to impute immoral conduct to the plaintiff in his character of Archbishop of *Tuam*? Is it not immoral to attempt to bribe any person to renounce his religion, and more especially one who, from his previous character, would be a disgrace to the church as one of its members? But, beyond this, *Maguire* was to have an ecclesiastical

preferment. This appears to me to be a most scandalous imputation on the archbishop, as it tends to shew that he was ready to give away part of the patronage bestowed by the founders of the church to promote the protestant religion, for the purpose of making proselytes of hypocrites; and a person, although not a member of the church, who makes use of a bribe for such a purpose, is certainly guilty of immoral conduct. The seducer is much worse than the seduced; as the latter may plead poverty for an excuse. But it has been said that no imputation could be cast on the character of the archbishop, as the Legislature has for more than a century held out the same sort of temptation to induce Catholic priests to abandon their faith and become protestants. Even if this had been the case for the space of one thousand years, it would not convince me that such a course was moral. But the Legislature has not done so. It has merely provided, that, if a priest abandon his religion, and be made a convert, he shall not be left to starve in the midst of a population that would be hostile to him, and without any means of employment. If a priest were converted to the established religion, he was not to be entirely deserted, or left wholly unprotected, but a maintenance was provided for him, not to induce him to become a convert, but to support him afterwards, as absolute ruin might follow, as the natural effects of such conversion. The allowance of 40*l. per annum* shews that it was not intended to operate as a temptation for the abandonment of one faith by the substitution of another. We are not, however, bound to take notice of these statutes, as they do not form a part of the law of *Great Britain*. They are applicable to *Ireland* alone. But I am clearly of opinion that enough can be collected from this record, if not to impute grossly immoral conduct to the archbishop, yet, to convey a charge which reflects on his moral character, and which, if true, or capable of proof, ought to exclude him from the high situation he now fills. An excess of religious zeal,

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although it may be an honourable feeling, may frequently carry a man beyond the line of discretion; but here, the charge imputed to the plaintiff, is, an attempt to convert a Catholic priest from his faith, by an offer of money and church preferment, which, to say the least of it, is a most disgraceful employment.

We have been referred to the case of *Goldstein v. Foss*, as being in point to shew that this declaration is insufficient, as there is no introductory statement to support the *innuendos* in either of the counts; but neither the facts of that case, nor what fell from me in delivering the judgment of the Court, appear to me to have any bearing on the question. There, the declaration,—after reciting, that the plaintiff was of good name, and had for years past carried on the business of a merchant, and had always behaved himself honestly, and had never been suspected to have been guilty of swindling or cheating,—alleged, that, before the committing of the grievances thereafter mentioned, divers persons had been and were associated together, under the name and description of “The Society of Guardians for the protection of trade against swindlers and sharpers;” and that the defendant *Foss*, under colour and pretence of being the secretary of the said society, had, from time to time, published, and was accustomed to publish, certain printed reports, for the purpose of denoting and signifying to the members of the said society the names of such persons as were deemed and considered swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society; and that the defendant falsely and maliciously composed, printed, and published, of and concerning the plaintiff, in the way of his trade and business, the libellous matter following, that is to say: “Society of Guardians for the protection of trade against swindlers and sharpers. I (meaning the defendant *Foss*), am directed to inform you, that the persons using the firm of *Goldstein* (meaning the plaintiff), *Castles*, & Co., and

Benjamin Porter, are reported to this society as improper to be proposed to be ballotted for as members thereof, (thereby meaning, that the plaintiff was *a swindler and sharper*, and an improper person to be a member of the said society);” and it was held, that the words of the libel, unexplained by introductory matter, were not actionable, and that the *innuendo* was not warranted by the libel itself, on the grounds, that it sought to extend and not to explain the meaning of the libel, and introduced a new fact, *viz.* that the libel intended to charge the plaintiff with being a swindler and sharper, which was not the natural import of the words contained in the libel, as the defendant did not therein report the plaintiff to be a swindler and sharper, but merely an improper person to be ballotted for as a member of the society; and a person might not be fit to become a member, although not a swindler or sharper, *viz.* either through old age, infirmity, inactivity, or various other causes; and there was no previous averment that it was the custom of the society to designate swindlers or sharpers by the terms “improper persons to become members of the society.” There too, there was no imputation of immorality to the plaintiff on the face of the libel, but merely that he was an improper person to be proposed to be ballotted for as a member of the society. Here, however, enough appears on the face of the libel itself to impute immoral conduct to the plaintiff, as archbishop, and the charge is sufficiently apparent on the record; at all events, it is too late to take the objection, after verdict.

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Mr. Justice PARK.—I am of the same opinion. Enough is conveyed by the *innuendo* to make the meaning of the libel intelligible to the Court; and the declaration itself contains a sufficient charge to make the letter or writing in question a libel on the plaintiff. It charges him, in his character of Archbishop of *Tuam*, not with acting as he ought to have done in the honest discharge of his duty, in pro-

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moting the protestant faith; but with having sought out a most improper person, *viz.* one charged with seduction, and selected him to be converted to the ministry of a protestant church; and with having offered to reward him, not for devotion to the protestant cause, whether of his own free will or through the persuasion of others; but, without assigning any reason, the writer says that the archbishop had promised *Maguire* 1000*l.* in cash, and a living of 800*l.* a year. The offer of advancing him to a living is the gist of the libel; and, although an *innuendo* cannot of itself give a meaning to a paper or writing which is not conveyed by the terms of the writing, or make that libellous which is otherwise not so; still I think that this writing does convey an imputation of immoral conduct to the plaintiff, which is sufficiently apparent on the face of the record.

Mr. Justice BURROUGH.—The only question is, whether we are to understand the words of this libel as the world at large would do. If so, there can be no doubt but that it conveys a most gross and infamous reflection on the plaintiff. He is charged, in his character of Archbishop of *Tuam*, with having tempted or sought to induce a Catholic priest to quit his religion, and become a convert to the protestant church, not for his good conduct (for he is charged with having been guilty of seduction), but by the means of a bribe. The allegations at the commencement of the declaration, coupled with the subsequent averments and *innuendos*, are sufficient to shew that this is a libel; and, indeed, that it is so, is apparent on the face of it. Although the declaration might have been better framed, it is, at all events, sufficient after verdict.

Mr. Justice GASELEE.—The meaning of the libel, to be collected from the declaration, is, to convey a charge of misconduct to the plaintiff, by having made an offer of 1000*l.* in cash, and a living of 800*l.* a year, to a Catholic

priest, in order to induce him to quit his religion and become a member of the protestant church. But it has been said that there is no preliminary averment or introductory statement to authorize the *innuendos*, which are the same in all the counts of the declaration; as the only allegations at the commencement of the declaration are the description of the characters of the parties; but it is afterwards alleged, that the defendant, to cause it to be believed that the plaintiff had misconducted himself as archbishop, and had promised *Maguire* a large sum of money, and a living of 800*l.* a year, and had written to a protestant clergyman to make such offer, in order to induce *Maguire* to accede to become a protestant clergyman, published the libel in question of and concerning the plaintiff, and of and concerning his conduct as such archbishop, *and of and concerning his said supposed offer to Maguire.* This is a sufficient allegation of the offer to which the libel refers, and the intent is, by *innuendo*, explained to be, to induce *Maguire* to accede to become a protestant clergyman. In the case of *The King v. Horne* (a), upon an information for writing and publishing a libel “ of and concerning his Majesty’s Government, and the employment of his troops,” the words *of and concerning* were held to be a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written of and concerning the King’s Government, and the employment of his troops. Here, the Jury have not only found that the libel was published of and concerning the plaintiff, but also of and concerning the supposed offer referred to in the previous part of the declaration; and, taking the whole together, it constitutes a complete statement, and must be taken to be sufficient after verdict. Although it is true that there are no positive allegations in the libel as to certain facts, yet the writer himself says, that no less a personage than the Archbishop

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(a) Cowp. 672.

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of *Tuam* made the promise to *Maguire* of 1000*l.* in cash, and a living of 800*l.* a year. That is the sting of the libel. But the writer proceeds to state, that the archbishop wrote to a protestant clergyman, desiring him to make the offer, and to shew the letter to *Maguire*, but not to surrender it into his possession, unless he, *Maguire*, was disposed to accede; and that all these facts were capable of proof. There is a positive allegation, therefore, that the offer was made; and, although it has been said that no improper conduct can be imputed to the plaintiff; yet, the object of the writer of the letter was to bring him into disrepute; and it is equally a libel, although it did not directly charge him with dishonest motives. Still, however, it does charge him with a consciousness of having acted wrong, as he desired his letter not to be given to *Maguire* unless he was disposed to accede to the proposition. On these grounds, I concur with the Court in thinking that there is no reason to arrest the judgment.

Rule refused.

Tuesday,
 June 10th.

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The defendant accepted two bills of exchange, drawn on him by *T. C.*, which the latter indorsed and paid into his bankers' (the plaintiffs) who entered the amount as cash

to the credit side of *T. C.*'s account in their books. The bills having been dishonoured by the defendant, the plaintiffs entered their amount to the debit side of *T. C.*'s account; and shortly afterwards the defendant paid the amount of both bills to *T. C.*, but did not require them to be delivered up. *T. C.* continued his banking account with the plaintiffs for three years after the bills became due, and paid in several sums to his credit, sufficient to cover all the items to his debit prior to the date, and including the amount, of the bills. *T. C.* afterwards became bankrupt, and the plaintiffs proved their debt under his commission without noticing the bills, and a year afterwards sued the defendant, as acceptor, having made no previous demand on him in respect of them:—*Held*, that he was not liable.

THIS was an action brought by the plaintiffs, as indorsees, against the defendant, as acceptor, of two bills of exchange, amounting to 131*l.* 10*s.*; the one dated the 19th October, 1822, and drawn by *Thomas Crawshaw* upon the defendant, payable to his, *Crawshaw's*, order, at four months after date, for 85*l.* 12*s.*; the other, dated the 12th

November, 1822, and drawn by *Crawshaw* on the defendant, payable at four months after date, for 45*l.* 18*s.*

At the trial, before Mr. Justice *Bayley*, at the last Summer Assizes, at *York*, it appeared that *Crawshaw* was a wool-stapler in the *West Riding*, and that the bills were accepted by the defendant for wool sold to him by *Crawshaw*, who indorsed them to the plaintiffs, his bankers, at *Leeds*, who entered their amount as cash to his credit in their books; that both the bills were dishonoured by the defendant, and, on their being returned for non-payment, the plaintiffs entered their amount to the debit side of *Crawshaw's* account; that, on the 19th *April*, 1823, the defendant paid the full amount of both bills to *Crawshaw*, with interest and expenses, but that he did not require them to be delivered up; that *Crawshaw* continued his account with the plaintiffs; and that the following entries appeared in their books:—

1823.	Dr.	L.	s.	d.	1823.	Cr.	L.	s.	d.
Feb. 26.	To returned bill 22 Feb.	85	17	2		By C. N. Holmes . .	20	9	0
Mar. 19.	To returned bill 15 Mar.	46	3	2	March 10.	By 1 bill,	90	6	6
					19.	By 4 ditto,	109	11	0

That, on a settlement of the accounts, at the end of the year 1823, the balance due from *Crawshaw* to the plaintiffs was 526*l.* 9*s.*; but that, by the 13th *January*, 1824, he had paid in 388*l.* 11*s.* 6*d.*, and, at the end of that year, his debit was 1061*l.* 9*s.*, and at the end of 1825 426*l.* 2*s.* 10*d.*; that *Crawshaw* had admitted those balances to be due, at the end of each of those years, and that no demand had been made on him in respect of the above bills of exchange; that, in *April*, 1826, *Crawshaw* became bankrupt, when the plaintiffs proved their full demand against him under the commission, and in their depositions they did not refer to the defendant's acceptances, but stated that *Crawshaw* was indebted to them in 2012*l.* 9*s.*, and that they had received no security or satisfaction whatsoever, save and except certain bills of exchange, and a bond,

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which were expressly referred to, but which did not include the bills in question. It also appeared that no demand had been ever made by the plaintiffs on the defendant, in respect of the bills, from the time they became due, in 1823, till the commencement of the present action in *Trinity* Term, 1827. One of the plaintiffs' witnesses swore that 20*l.* 3*s.* had been paid by one *Holmes* on account of the defendant's acceptances. It was insisted, for the plaintiffs, that the defendant could only be discharged by a release or payment to them as holders of the bills; whilst, for the defendant, it was contended, that, as they had been passed to *Crawshaw's* credit account, it was equivalent to a payment by him. The Jury, however, found a verdict for the plaintiffs for the amount of the bills and expenses thereon, the learned Judge reserving leave to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the plaintiffs' passing them to *Crawshaw's* credit could, under the circumstances, be considered as payment.

Mr. Serjeant *Jones*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi* for a nonsuit, or that a new trial might be granted; and, in support of the latter, he produced affidavits, which stated, that it was usual for bankers in *Yorkshire* to hold acceptances whether they were paid or not; that the defendant never had any transaction with *Holmes*, nor did he know such a person; that he was taken by surprise, and was not prepared to rebut such statement at the trial; and that it appeared, on the face of the plaintiffs' accounts with *Crawshaw*, that the latter had, in *January*, 1824, paid in to his own credit a sum sufficient to cover all the items placed to his debit in 1823, in which the amount of the bills in question was included: and *Crawshaw* deposed, that, on the 10th *March*, 1823, he paid the plaintiffs 90*l.* 6*s.* 6*d.*, and, on the 19th of the same month, 109*l.* 11*s.*, as well on account of the above accept-

ances as on his general account, but without particularly specifying on what account such sums were paid.

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Mr. Serjeant *Spankie* now shewed cause.—The rule established in *Clayton's* case (a),—that, in the case of a banking or running account, where there has been a continuation of dealings, the appropriation (in the absence of express declaration) can only be made on the ground of presumption arising from the priority of receipts and payments; or, in other terms, that subsequent payments by the debtor must be taken to apply to the discharge of the oldest debt; and that, if any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment,—does not apply to the present, as the defendant's acceptances were paid in to the plaintiffs' house by *Crawshaw*, as cash, in the first instance, and were not written in short, according to the custom of bankers in *London*, and the plaintiffs gave him credit accordingly; but, as soon as the bills were dishonoured they were placed to *Crawshaw's* debit; yet there is no pretence for saying that any subsequent payment by him was to be applied in the extinction of those bills. The defendant was a debtor to *Crawshaw* for value, and, as the acceptor of the bills, was primarily liable to the holders, and nothing would discharge him but actual payment to them. The plaintiffs, as bankers, held the bills as an additional security on *Crawshaw's* general account; and when he made any payment after their dishonour, if he had stated that it was intended to cover them, they would have been given up to him as a matter of course; but, as no such statement was made, the general payments on account could not affect those bills which the plaintiffs held as distinct and separate securities, and which must be considered as having been taken out of the general account when they were re-

(a) 1 Meriv. 608.

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moved from *Crawshaw's* credit, to which side of the account they had originally been placed.

Mr. Serjeant *Jones*, in support of his rule.—The defendant is not only by law and justice entitled to the benefit of the payments made by *Crawshaw* to the plaintiffs, after the discharge of his acceptances to *Crawshaw*, but this case falls expressly within the principle established in *Clayton's* case. Besides, the plaintiffs themselves treated the bills as paid; for they not only made no demand in respect of them when the balances were struck on the settlement of *Crawshaw's* accounts for three successive years, but they did not even prove them under his commission; nor did they ever make any demand on the defendant until *April*, 1827, four years after the bills became due, and one year after *Crawshaw's* bankruptcy. Although the defendant did not demand the bills of *Crawshaw* when he paid him their amount in *April*, 1823, still, such amount formed an item in *Crawshaw's* general account with the plaintiffs, and was, consequently, extinguished by subsequent payments made in the course of that year, or, at all events, by the 13th *January*, 1824. In *Bodenham v. Purchas* (a), a bond was given to several persons constituting the firm of a banking house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor. One of the partners died, and a new partner was taken into the firm; and at that time a large balance was due from the obligor to the firm, and advances were afterwards made by the bankers, and payments made to them on account by the obligor, who was credited by the new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account; and the balance due at the time of the partner's death was considerably reduced, and such re-

(a) 2 Barn. & Ald. 39.

duced balance, by order of the obligor, was transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor; and the person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond; and it was held, that, as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that, having received, in different payments, a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. There, the principles laid down by the Master of the Rolls, in *Clayton's* case, were recognized and adopted; and, in the subsequent case of *Simson v. Ingham* (a), a bond was given by country bankers to the several persons constituting the firm of a *London* banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the *London* bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the *London* bankers; and it was the course of business between the two houses, for the *London* bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the *London* bankers received in payment sums more than sufficient to discharge the balance then due; but, during the same time, they advanced money on account of the country bankers, to an equal amount. In the first instance, the *London* bankers entered in their books all receipts and payments made after the death of the deceased partner, to the account of

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(a) 2 Barn. & Cress. 65; S. C. 3 Dow. & Ryl. 249.

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the old firm; but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one, the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time; and it was held, that the entries in the books of the *London* bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it, and, therefore, that the *London* bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner, to the debt of the new firm. But in this case there was a general and continuous account between the plaintiffs and *Crawshaw*, both before and after the dishonour of the bills; and as they formed an item in such account, their amount was extinguished by the earliest sums paid in by *Crawshaw* after the bills were returned to the plaintiffs; and, although *Crawshaw* was then debited with their amount, yet, the sums afterwards paid in by him were not only sufficient to cover the bills, but also all previous advances.

Lord Chief Justice BEST.—I am of opinion, upon the principle established in *Clayton's* case, and which was recognised and confirmed in *Bodenham v. Purchas*, and *Simson v. Ingham*, that the rule for a nonsuit must be made absolute. The learned Judge who tried the cause, has reported to us, that the action was brought on two bills of exchange, the one dated on the 19th *October*, the other on the 12th *November*, 1822, and drawn by one *Thomas Crawshaw* upon and accepted by the defendant, payable at four months after date. They were given in payment to *Crawshaw* on account of wool purchased from him by the defendant, and *Crawshaw* indorsed and paid them

into the house of the plaintiffs, his bankers, at *Leeds*. In *April*, 1823, which was about a month after the last bill became due, the defendant paid to *Crawshaw* the amount of both, together with the expenses and interest due thereon; but, incautiously reposing a confidence in the latter, he did not require him to deliver up the bills. That payment, however, did not discharge the defendant, as *Crawshaw* was not the holder of the bills, they being in the hands of the plaintiffs, his bankers, who had a right to call on the acceptor for their amount; and their having entered them to the debit of *Crawshaw* in their books, would not have the effect of discharging the defendant, as they might treat the one as their debtor, being a customer, and pursue their remedy against the other as a stranger, and who, as acceptor, was the party primarily liable.—But, I am of opinion, that the ground on which this rule for a nonsuit must be made absolute, is, that, long after the bills became due, and the defendant had paid *Crawshaw* their amount, the plaintiffs had not only entered them to his debit, but treated them as having been paid; and if so, they must, according to the rule laid down in *Clayton's* case, be considered so far satisfied as to discharge the defendant as acceptor; and, although there are exceptions to that rule, with respect to the appropriation of payments, in cases of separate and distinct accounts, still it does not apply here, as this was a joint account between the plaintiffs and *Crawshaw*, and treated by both parties as one entire running account. In *Bodenham v. Purchas*; Mr. Justice *Bayley* said (a): “The decisions in the Courts of law do not break in upon the distinction taken in *Clayton's* case. The principle established by those decisions is this, that, where there are distinct accounts, and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such pay-

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(a) 2 Barn. & Ald. 45.

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ment to which account he pleases; but, where the accounts are treated as one entire account by all parties, that rule does not apply;" and that learned Judge, after stating the facts of the case in *Bodenham v. Purchas*, further observed (a): "It certainly seems most consistent with reason, that, where payments are made upon one entire account, such payments should be considered as payments in discharge of the earlier items:" and Mr. Justice *Abbott* said (b), "the Master of the Rolls says (c), 'in such a case' (that is, a banking-account) 'there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts.'" But neither Sir *William Grant* nor Mr. Justice *Bayley* say that such a circumstance is conclusive. It is certainly open to a party to shew that he has made a payment on account of one particular bill of exchange or item on the debit side of his account; but, in the absence of proof of any particular application of sums paid in, the first payment must be appropriated to the discharge of the first or oldest debt; and, if that course be pursued, the bills in question must be considered as paid or satisfied. Although there was always a balance against *Crawshaw* in the plaintiffs' books, yet, at one particular time, viz. in *January*, 1824, enough had been paid in by him on his general banking-account, to discharge all the items in his debit account previous to the bills, as well as the bills themselves. But we shall not act in contradiction to *Clayton's* case, nor to any

(a) 2 Barn. & Ald. 46.

(b) Id. 47.

(c) See 1 Meriv. 608.

other previous authority, by deciding for the defendant, for this appears to be a far stronger case in his favour than any which have preceded it, because, in the years 1823, 1824, and 1825 the plaintiffs treated the bills as paid. In 1826, the state of affairs between the plaintiffs and *Crawshaw* was changed, as, in the month of *April* in that year, he became a bankrupt, and yet, the bills were not proved under his commission, and no claim or demand was made by the plaintiffs on the defendant in respect of them till 1827; and they then, for the first time, sought to turn round and attempt to recover from him, although the account between them and *Crawshaw* had been liquidated and closed; and although they were told by the defendant, on application being made to him, that he had paid *Crawshaw* the amount of the bills. It would not only be inconsistent with honesty, but with the rule of law as settled by Sir *William Grant*, (whose decisions are always entitled to the greatest attention and respect), if the plaintiffs could be deemed entitled to recover. The principles laid down in *Clayton's* case have since received the sanction of every Court in *Westminster Hall*, and are in favour of the defendant's application.

Mr. Justice PARK.—I am of the same opinion. The rules laid down in *Clayton's* case have since been adopted and supported to their fullest extent; or, at all events, that case has established a principle upon which we can now act. Each case must depend upon its own particular circumstances, and the facts here stated are most pregnant in favour of the defendant. He accepted the bills in question in 1822, and the last was payable in *March*, 1823, and a month after its dishonour he paid the amount of both, with interest and expenses, to *Crawshaw*, the drawer, but allowed them to remain in the hands of the plaintiffs, the bankers of *Crawshaw*; and they never took any notice of them, or made any demand on *Crawshaw* from that time

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till 1826, when he became bankrupt; nor did they even then prove them as against his estate. Previously to the bankruptcy, he had paid in to his credit sums more than sufficient to cover not only the amount of the bills, but to discharge all previous items to his debit, and yet no demand was ever made on the defendant until 1827, twelve months after the bankruptcy. As, therefore, the plaintiffs had previously treated the bills as waste paper, and the defendant had *bond fide* paid their amount to *Crawshaw*, the drawer, at the time he was a customer of the plaintiffs, and kept a running account with them, it appears to me, that the law, as well as the justice of the case, are clearly with the defendant.

Mr. Justice GASELEE (*a*).—If the point turned solely on the fact of the plaintiffs' carrying the bills in question to *Crawshaw's* credit, when they were paid into their banking house, I should wish time to consider before I came to a decision; but the question is, whether, under all the circumstances, and their transferring the bills to his debit after they were dishonoured, did not destroy their claim as against the defendant. But, independently of this, it appears, by the subsequent accounts between the plaintiffs and *Crawshaw*, as well as by their own conduct, that they considered the bills as extinguished or satisfied. In that view of the case, it is not necessary to consider whether they had been paid by the defendant, as the acceptor, for the plaintiffs admitted, by their account with *Crawshaw*, that they received monies from him subsequently to the return of the bills, not only sufficient to cover them, but also all the previous items placed to the debit side of his account.

Rule absolute, for a nonsuit (*b*).

(*a*) Mr. Justice *Burrough* was at Chambers.

(*b*) See *Brooke v. Enderby*, 4 B. Moore, 501.

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PREECE v. CORRIE.

Wednesday,
June 11th.

THIS was an action of replevin, for taking the plaintiff's cattle and goods, on the 26th *October*, 1826, on certain lands and premises called *Lye Court*. The defendant made cognizance as bailiff of one *Thomas White*, and alleged, that the plaintiff, on the 11th *September*, 1826, and from thence until &c., held and enjoyed the said premises; as tenant to *White*, under and by virtue of a demise thereof to him, the plaintiff, theretofore made for a certain term, to wit, from the 11th day of *September*, 1826, until the 11th day of *November* then next, at and under a certain rent, to wit, the rent of 270*l.* for the said term, payable on the first day of the said term, to wit, on the said 11th *September*, in the year aforesaid; and, because the said rent, at the said time when &c., was due and in arrear from the plaintiff to *White*, the defendant well acknowledged the taking, &c.

The plaintiff pleaded in bar,—*First*, that he did not hold or enjoy the premises in which &c., or any part thereof, as tenant to *White*, under or by virtue of the said supposed demise, in manner and form as by the cognizance alleged;—*Secondly*, that, by the said supposed demise in the cognizance mentioned, he, *White*, did demise and grant the said premises unto the plaintiff for all the residue and remainder of his, *White's*, estate, term, and interest, of and in the same; and that he, *White*, had not then, or at the said time when &c., or at any time during the supposed demise to the plaintiff, any reversionary estate, term, or interest, of or in the premises, or any part thereof, expectant or to take effect upon or at any time after the expiration of the term granted to the plaintiff by the said supposed demise:—And this &c. wherefore &c.

The defendant joined issue on the first plea, and replied to the second,—That, by the demise in the cognizance men-

Where a person transfers all his interest in a term to another, reserving rent to himself, it does not operate as an assignment, but as an underlease: Therefore, where *J. S.* had a term in certain premises, which expired on the 11th *November*, 1826, and, on the 11th *September* preceding, he verbally let them to the plaintiff, to hold till the 11th *November*, on paying down an immediate rent: *Held*, that *J. S.* could not distrain, as the terms of the letting amounted to a lease, by which the whole of his interest passed to the plaintiff; and that even if it were an assignment, it was not necessary that it should be in writing, as it was an assignment by operation of law, and within the exception in the third section of the Statute of Frauds.

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tioned, *White* did not demise and grant the premises to the plaintiff for *all* the residue and remainder of *White's* estate, term, and interest, of and in the same, in manner and form as the plaintiff had in his second plea in that behalf alleged: and on this issue was joined (a).

At the trial, before Mr. Justice *Littledale*, at the last *Summer Assizes* at *Hereford*, it appeared, that one *Robert Eastwick* was mortgagee in possession of the lands and premises in question, which were occupied by the plaintiff, he and his brothers being seised in fee of the equity of redemption; that, in *October 1823*, *Eastwick* let the farm to *White* for the term of three years from the 11th *November* then next, at the yearly rent of 270*l.*; that, on the 23d *January*, 1826, by an agreement in writing, under seal, and made between *White* and the plaintiff, the former agreed to give up possession of the farm to the latter, in consideration of his paying the value of the growing crops then belonging to *White*, and the plaintiff was to hold the farm for the remainder of *White's* term, at the same rent as *Eastwick* paid; the rent to commence and be payable by the plaintiff, from the 11th *November* then last past; but it was provided, that, in case the plaintiff should not be enabled to pay for the crops by the 1st *May*, 1826, *White* might retain the farm for the remainder of the term; that, on the 11th *September* following, the plaintiff, by bill of sale, assigned all the growing crops and effects on the farm to *White*; and that, afterwards, and in the course of the same day, *White* agreed verbally with the plaintiff, in the presence of two witnesses, that he would become tenant to *White*, from that day till the 11th *November* following, at the rent of 270*l.*, payable in advance immediately.

Under these circumstances, the learned Judge left it to the Jury to say, *first*, whether the demise was made by

(a) The plaintiff also pleaded him to *White*; on which issue was that no rent was in arrear from also joined.

White to the plaintiff, on the terms last mentioned; and, *secondly*, whether *White* had demised *all the residue* of his term to the plaintiff, within the terms of the second plea in bar; and he observed, that the relation of landlord and tenant did not subsist between them unless the former had a reversionary interest; that, although the word *grant* was used in the plea, it was enough for the plaintiff to shew that *White* had parted with the whole of his interest to him; and that a demise of such interest might be by parol; that the main question was, whether the parties virtually intended that the plaintiff should take *all White's* interest in the term he derived under *Eastwick*; and that, if *White* had parted with the whole of his interest, the distress could not be supported.

The Jury found, *first*, that there was a demise by *White* to the plaintiff; and, *secondly*, that the former had parted with the whole of his term; on which the learned Judge said, that the effect of the verdict was, to entitle the plaintiff to recover, as the latter finding negatived the defendant's right to distrain. A verdict having been accordingly entered for the plaintiff,—damages 4*l.* 4*s.*—

Mr. Serjeant *Russell*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, or a verdict entered for the defendant;—on the grounds,—*first*, that the Jury had found that the plaintiff had held the premises under a demise from *White*, in the terms stated by the defendant in his cognizance; and, *secondly*, that the plaintiff had not proved his second plea in bar, in which he alleged that *White* had demised and granted *all the residue* and remainder of his estate in the premises to the plaintiff, and that he had not any reversionary interest therein after the expiration of the plaintiff's term. Such an allegation amounts, both in fact and at law, to an absolute assignment by *White* of all his interest in the premises; and if so, such an assignment is void, not having been proved to be in writing, as

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required by the statute of frauds. If a party transfer all the residue of his interest in a term to another, it is equivalent to an assignment; and, although the word "grant," as used in the plea, might be rejected as surplusage, and the allegation might not amount to an assignment, yet it must be taken as if *White* had *demised* the premises to the plaintiff, reserving a rent; in which case, the former would have a right to distrain. An assignment or demise by parol may operate as an under-lease, and although the word "*demise*," in its popular and general acceptation, applies to a lease, yet here the plaintiff has averred that *White* had not any reversionary estate or interest in the premises after the expiration of the term demised and granted by him to the plaintiff. That must be taken to mean an absolute conveyance or assignment, which could not be made by parol. Therefore, *quâcunque viâ datâ*, the defendant is entitled to a verdict.

Mr. Serjeant *Ludlow*, on a former day in this term, was about to shew cause, when the Court called on—

Mr. Serjeant *Russell* to support his rule. The plaintiff having alleged in his second plea, that *White*, under whom the defendant made cognizance, had no reversionary interest in the premises, after the expiration of the term demised to the plaintiff, it is immaterial to consider whether he took by grant or by demise, for it must be assumed that all *White's* interest was assigned to the plaintiff; and, as it was not proved to have been in writing, the latter was not entitled to recover. It will be a manifest hardship on *White* if the distress cannot be supported; which must be on the grounds, either that the first issue of *non tenuit* was not proved, or that the plaintiff established his second plea; but that he failed to do, as he did not produce an instrument in writing, signed by *White*, as the party assigning his interest in the term, but merely proved a letting

by word of mouth. In *Bacon's Abridgment* (a), it is said, "an assignment is the transferring and setting over to another of some right, title, or interest in things, in which a third person, not a party to the assignment, has a concern and interest:"—if, therefore, a party transfers all his interest to another, in whatever terms, or by whatever form of words the transfer be made, it amounts to an assignment; and, as the plaintiff has averred in his plea, that *White* demised all his interest, and had *no reversionary estate*, the concluding words are decisive to show that it is equivalent to an averment of an assignment. Although it may be admitted that the word *demise* is generally confined to a granting by lease, yet Lord *Coke*, in his second Institute, in commenting on the statute of *Westminster* the second, says (b),—"a demise is applied to an estate either in fee simple, fee tail, or for term of life, and so commonly it is taken in many writs." So, a demise may apply to the death of the King, or a conveyance or transfer of property, by copy of court roll. But the agreement by *White* to let the premises to the plaintiff, is, in terms, an absolute assignment: and, in *Botting v. Martin* (c), where the plaintiff agreed verbally to assign to the defendant certain premises for the remainder of a term of years then unexpired therein, Lord Chief Baron *Macdonald* held the assignment to be void under the statute of frauds, it not being by deed or note in writing. At all events, the plea of *non tenuit* cannot avail the plaintiff, as the Jury have found that *White* demised to him in the terms stated in the cognizance, which clearly constituted a tenancy; and the plaintiff could not deny the holding under *White*; and, if the transfer by the latter of all his interest in the term did not amount to an assignment, it operated as an under-lease, in the one it created the characters of assignor and assignee, in the

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(a) Tit. "Assignment."

(b) 483.

(c) 1 Camp. 318.

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other, that of landlord and tenant; and, in *Poultney v. Holmes* (a), it was decided, that, if a lessee reserve rent to himself on granting over, it is an under-lease, although he part with the whole term; and, if so, the defendant was entitled to distrain. The case of *Poultney v. Holmes* was recognized and adopted in *Palmer v. Edwards*, by Mr. Justice *Buller*, who said (b), that it only determined, that what cannot be supported as an assignment, shall be good as an under-lease, against the party granting it. Whether, therefore, the letting by *White* amounted to an assignment or an under-lease, the plaintiff could not dispute *White's* title; and, according to the case of *Alchorne v. Gomme* (c), the second plea in bar amounts in substance to a plea of *nil habuit in tenementis*, and Lord Chief Justice *Best* there said, "the rule has been long since established, that a tenant cannot dispute the title of his landlord at the time of the demise, although he may shew that such title had afterwards determined;" and here, the Jury have expressly found that *White* demised to the plaintiff according to the terms mentioned in the cognizance.

Mr. Serjeant *Ludlow*, having referred to *Parmenter v. Webber* (d), to shew that a lessee who assigns all his interest in a term cannot distrain for rent, the Court took time to consider, and—

Lord Chief Justice *BEST* now said:—A motion has been made in this case to set aside a verdict found for the plaintiff, and for a new trial, or that a verdict may be entered for the defendant. My brother *Littledale* has not reported to us whether he reserved the point now brought before us, or not; but I am clearly of opinion, in

(a) 1 Str. 405.

Bing. 54.

(b) 1 Doug. 188, n.

(d) 2 B. Moore, 656.

(c) 9 B. Moore, 130; S. G. 2

which all my learned brothers concur, that there is no pretence for this motion. Whether another motion might have availed, founded on the defective state of the pleadings, or the insufficiency of the second plea, as it appears on the face of the record, is another question, but on that we now give no opinion. This was an action of replevin, and the defendant made cognizance as bailiff of one *Thomas White*, alleging that the plaintiff held the premises in question as tenant to him, by virtue of a demise to the plaintiff, from the 11th *September* 1826, until the 11th *November*, in the same year, at the rent of 270*l.*, payable on the first day of the term, viz. the 11th *September*; and that, such rent being in arrear from the plaintiff to *White*, the defendant, as the bailiff of the latter, made the distress. To this there were three pleas in bar, but two only apply to the present question, viz.—*First, non tenuit*, which concluded to the country; and, *secondly*, that *White*, by virtue of the demise in the cognizance mentioned, demised and granted the premises to the plaintiff for the whole of his (*White's*) estate and interest in them; and that he had not, at any time during the demise to the plaintiff, any reversionary estate, term, or interest in them, expectant or to take effect upon or at any time after the expiration of the term granted to the plaintiff by the demise. Upon these pleas, issues were joined, and the Jury found for the defendant on the first, viz. that there was a demise by *White* to the plaintiff. But on the last, they found that *White* had parted with the whole of his estate, term, and interest in the premises; thereby negating his right to distrain: and by which the plaintiff was entitled to a verdict. I abstain from giving any opinion as to what *White's* remedy might have been, or what mode of proceeding it may be most proper for him to adopt hereafter, in order to recover the sum agreed to be paid by the plaintiff for rent;

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but I am clearly of opinion, that the finding of the Jury on both these pleas was proper. At first sight, it might appear that the first plea of *non tenuit* ought not to have been found for the defendant; as, if the letting by *White* to the plaintiff operated as an assignment, the Jury should have found for him. But, in the cognizance, the plaintiff is alleged to have held under a demise, and the first plea negatives the holding by virtue of the demise, *modo et formâ* as in the cognizance mentioned. This, however, is not to be considered as an assignment, but a lease, although, in operation of law, it amounts to an assignment of all *White's* interest to the plaintiff. The case of *Poultney v. Holmes*, although it shews that this was not an assignment, also shews that the defendant had no right to distrain. There, the defendant having a term for years, whereof one year and three quarters were to come, agreed with the plaintiff that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease. The plaintiff took possession, and brought trespass against the defendant for a re-entry; and it was objected, that this amounted to an assignment of the lease, and was, therefore, void by the statute of frauds, not being in writing; to which it was answered for the plaintiff, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and that the lessee might maintain debt for rent upon it, though *he could not distrain for want of a reversion*;—to which Chief Justice *Pratt* assented, and the plaintiff had a verdict. Here, however, the transaction which took place between *White* and the plaintiff, on the 11th *September*, amounts to a lease by operation of law; and, although it has been said that it was an assignment, and no evidence could be given of it, as it was not reduced into writing, as required by the statute of frauds, yet, in the case of an as-

signment or surrender "by act and operation of law," no deed or written memorandum is necessary (a), as the third section enacts, that no estate of freehold, or term of years, shall be assigned, granted, or surrendered, unless it be by deed in writing, signed by the party assigning, or by act and operation of law; and here *White* professed to part not only with the possession, but also with all his reversionary estate and interest in the premises: and it is not only so alleged in the second plea in bar, but the Jury have so found, and the verdict for the plaintiff must stand. Although the second plea may not be good in point of law, yet the case of — v. *Cooper* (b), on the authority of which this Court acted in *Parmenter v. Webber*, is decisive to shew, that where a lessee for years assigns his term, or parts with his interest, he cannot distrain for rent; and that is not inconsistent with *Poultney v. Holmes*, where Chief Justice *Pratt* thought that the lessee might maintain debt for rent, although he could not distrain, for want of a reversion. My brother *Park*, who is obliged to be at the *Old Bailey*, has requested me to state that he concurs with me in opinion.

Mr. Justice GASELEE.—In *Smith v. Mapleback* (c), where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises, on the terms mentioned in the lease, and should pay a specified sum, over and above the rent, annually, towards the good-will already paid by such assignee," such agreement was held to operate as a surrender of the whole term, and, therefore, that the assignee could not distrain either for the advanced or for the original rent, but that he had a remedy by *assumpsit*, for the

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(a) See Phillips on Evidence,
5th edn. Vol. 2, p. 68.

(b) 2 Wils. 375.

(c) 1 Term Rep. 441.

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sum reserved for the good-will. There, too, the case of *Poultney v. Holmes* was referred to in the course of the argument, and a distinction drawn between contracts by deed and by parol, previous to the statute 4 Geo. 2, c. 28, by which distress is incident, wherever a rent is reserved; but where a party has surrendered his whole term, it is quite clear that he is not afterwards entitled to distrain.

Mr. Justice BURROUGH concurring—

Rule discharged.

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June 11th.

A tradesman cannot recover the value of articles of dress furnished to a wife, if the husband allow her a sufficient supply, and the tradesman make no enquiry as to the capacity of the wife to contract; at all events, an express or implied assent by the husband must be shewn.

Payment of money into Court in *assumpsit* for goods sold and delivered, only amounts to an admission by the defendant of the plaintiff's right of action to the amount of the sum paid in, and applies only to a legal

SEATON v. BENEDICT.

THIS was an action of *assumpsit*, brought to recover the sum of 28*l.* 5*s.* 6*d.*, being the amount of several pieces of silk, muslin, and lace, and a quantity of kid gloves and silk stockings, which the plaintiff alleged he had delivered to the defendant's wife. The declaration contained counts for goods sold and delivered, and the usual money counts. The defendant pleaded *non assumpsit*, except as to 10*l.*, and a tender as to that sum, which he paid into Court, and which the plaintiff admitted, by taking it out.

At the trial, before Mr. Justice *Burrough*, at *Westminster*, at the sittings after the last *Hilary* Term, it appeared that the plaintiff was a linen-draper and haberdasher at *Richmond*; and, that in the autumn of 1823, the defendant, a special pleader in considerable practice, with his wife and family, occupied part of a ready furnished house at *Montpelier-Row, Twickenham*, at the rent of two guineas *per week*. By the plaintiff's particulars of demand, the articles were stated to have been furnished at six different periods, between the 15th *August* and the 23d *September*,

demand, and not to all the items contained in a bill of particulars, in which the goods are stated to have been supplied at different times.

1823; and, on the 19th of *August*, a charge was made for twelve pairs of silk stockings, as having been delivered on that day, and which was the second item in the bill. The plaintiff proved the delivery of the whole of the goods to the defendant's wife, in his (the plaintiff's) shop, with the exception of one small parcel, which was delivered into her own hand by the plaintiff's boy, at the defendant's door, no third person being present. There was no evidence of any authority, express or implied, from the defendant to the plaintiff, to give credit to his wife; or that the defendant ever knew that she had dealt with the plaintiff, or that the articles furnished were in her possession. The defendant proved that he had abundantly supplied his wife with necessaries suited to his rank and situation in life: that her wardrobe was complete before she left town for *Twickenham*; and that he never saw her wear any of the articles furnished by the plaintiff: and three female servants who lived with the defendant at the time, one of whom had the care of her mistress's wardrobe, deposed, that if any of the articles in question had been worn by her, or had been in her possession, she (the servant) must have seen them; but that she never had, and that she never took in any parcel from the plaintiff. Under these circumstances, it was contended for the defendant, that the articles supplied could not be considered as necessaries; and that, even if they were, there had been no express or implied authority or assent given by the defendant to his wife to make the purchases in question from the plaintiff.

The learned Judge told the Jury that a husband was bound to supply his wife with necessaries to the extent of his estate, and suitable to her rank and degree in life; and that if he did not, he would be liable for any necessary articles the wife might purchase; but that if, on the contrary, he was in the habit of supplying her with all articles that might be necessary for her use, he was not liable for any thing beyond them; and that the question for their

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consideration was, whether, under the circumstances, the defendant was or was not liable;—that, as it did not appear that he was aware of his wife's dealing at the plaintiff's shop, or that he knew that the articles supplied had been sent to his house, or were worn by his wife, he should have considered that he had a good defence; but that the difficulty under which he laboured was the plea of tender, by which the defendant had thought fit to admit a claim on him, by the plaintiff, to the extent of 10*l.*; and that the question was, how to separate that sum from the rest of the demand, or to apply it to any particular item of the bill; that the defendant had thereby also admitted that his wife had authority to purchase some of the articles; and that, as it was not stated to which of them the tender and payment into Court applied, it was for the Jury to say to which items in the bill the payment was to operate, or if they could be separated; and whether, if one could not be distinguished from the others, it did not amount to an admission of the whole of the plaintiff's demand.

The Jury having retired for a considerable time, the foreman, on returning into Court, said, that, after very great difficulty, they had concurred in finding a verdict for the plaintiff. The verdict was accordingly entered for him for 18*l.* 5*s.* 6*d.*, which, together with the 10*l.* paid into Court, amounted to the whole of the plaintiff's demand, leave being reserved to the defendant to move to set aside the verdict, in case the Court should be of opinion that the defendant had not, by his plea of tender, precluded himself from having a verdict entered for him.

Mr. Serjeant *Wilde*, in the last term, accordingly obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, on the grounds, *first*, that the articles furnished could not be considered as necessaries, as the wardrobe of the defendant's wife was previously complete; and that, at all events, the plaintiff could not be entitled

to recover, after so long a lapse of time, the articles having been furnished in 1823; and he referred to *Montague v. Benedict* (a), where the Court of *King's Bench* decided, that articles of jewelry furnished to the defendant's wife, after her return from *Twickenham* to Town in 1823, were not necessities, and that the action could not be maintained without evidence of the assent of the husband. *Secondly*, that by the plea of tender and payment of 10*l.* into Court, the defendant had merely acknowledged an authority or assent for his wife to contract to that amount, but that he did not thereby recognize or admit any other part or item of the plaintiff's demand.

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Mr. Serjeant *Taddy* now shewed cause.—The question was most properly left to the Jury, whether the articles furnished by the plaintiff to the defendant's wife might be considered as necessities suitable to her degree and rank in life, and they having found in the affirmative, and there being evidence on both sides, the verdict is conclusive. The learned Judge naturally felt a difficulty as to the plea of tender, as the defendant thereby admitted the validity of the contract made by his wife with the plaintiff to the extent of 10*l.*; and, although a distinction may be drawn between cases where money is paid into Court on a special contract, or under the general counts of a declaration in *assumpsit*; yet here, it was impossible for the Judge or Jury to ascertain to what description of goods, or to what items of the account, the sum tendered applied; and it was, therefore, sufficient for the Jury to say that they were necessities suitable for the wife; and the authority or assent of the husband for her to purchase, must be implied from the fact of the tender and payment into Court. The main question at the trial was, to whom the credit was given, and the plaintiff proved that part of the goods were delivered to the wife at the defendant's own door. In *Montague v.*

(a) 3 Barn. & Cress. 631.

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Benedict (a), which was an action against the same defendant, for jewelry furnished by the plaintiff to his wife, which was held to be altogether unnecessary for her station in life, and in the course of six weeks she had laid out half of her yearly income in trinkets. In *Holt v. Brien (b)*, and *Bentley v. Griffin (c)*, the credit was given expressly to the wife, thereby negating any authority or assent on the part of the husband; as, in the one case, the tradesman had notice not to trust the wife, as well as that the husband allowed her an annual income; and, in the other, the plaintiffs, who were dress-makers, debited the wife in their books, and she had accepted bills drawn on her by them, and they had also requested her to provide for one of them without making any application to the husband. Here, however, the wife must be considered as the agent of the husband; and, if this were the case of a servant authorized by his master to order goods to the amount of 10*l.* only, yet, as the latter had admitted the authority of the former to a certain extent, he would be liable to the tradesman if the servant had exceeded the order, unless he had communicated to such tradesman that the servant had only a limited authority. But, here, the defendant has admitted by the tender, that his wife was authorized by him to order goods from the plaintiff to a given extent, thereby rendering the contract valid; and a general agency in the wife must be presumed, unless the defendant had shewn that she had only a limited authority. The defendant might and ought to have pleaded the tender specially, and limited the payment to a particular day, or certain items of the account; but as the plaintiff has declared on the general counts for goods sold and delivered, and the defendant has not shewn by his plea to what articles the tender was meant to apply, it

(a) 3 Barn. & Cress. 631; S. C. *nomine Montague v. Baron*, 5 Dow. & Ryl. 532.

(b) 4 Barn. & Ald. 252.
 (c) 5 Taunt. 356.

must be inferred, that the only question in dispute was the amount of the price charged, or that the tender has reference to quality rather than to quantity. It was impossible for the plaintiff to know whether the wardrobe of the defendant's wife was well supplied or not, at the time she ordered the goods; and a tradesman is not bound to make such an enquiry. The case of *Bennett v. Francis* (a) is decisive to shew, that where money is paid into Court generally upon a declaration in *assumpsit*, it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. There, the defendant, who had possessed himself of goods belonging to the plaintiff, and had sold part, and kept the residue in specie, paid money into Court generally upon a declaration containing a count for goods sold and delivered; and it was held that he had thereby admitted the transaction to have been converted into a contract, and that the plaintiff was entitled to recover the value of all the goods under the count for goods sold.

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Mr. Serjeant *Wilde*, in support of his rule.—Although the rights and liabilities of the plaintiff and defendant were most properly left to the Jury, yet the learned Judge had no doubt but that the latter had a good defence to the action, and that he would have been entitled to a verdict had he not pleaded a tender, and paid the sum tendered into Court. But the mere payment of money into Court does not impeach the ground of defence to an action, nor affect the defendant, so as to render him liable to the plaintiff, if he could not be deemed so from the facts proved at the trial. Payment of money into Court admits a cause of action to the extent of the money paid in, but no further. A wife can only bind her husband as any other agent might

(a) 2 Bos. & Pul. 550.

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do, *viz.* by authority; and although an authority may in some cases be implied, yet it must vary according to circumstances: and the rule is, that a wife may contract for necessities, if they be not supplied by the husband, but if she be adequately provided by him, and no express authority to contract be shewn, such authority cannot be implied. This principle was most clearly laid down by Mr. Justice *Holroyd* in *Montague v. Benedict*, where that learned Judge is reported to have said (a): "Undoubtedly, the husband is liable for necessities provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can shew an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and, if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. I think that the burden of the proof of the assent of the husband lies on the party who provided the goods, and who acted upon the supposed authority." So in *Etherington v. Parrot* (b), it was held, that contracts made by the wife do not bind the husband, unless his authority or assent is proved, or there are facts from which it can be presumed; and that, if she take up goods and pawn them, the husband is not bound to pay for them, because they never came to his use. Now, here, the wife's wardrobe was not only abundantly supplied, but neither the defendant nor any of his servants had the slightest knowledge that any of the articles in question had been sent. But it has been said that the main, if not the only, difficulty arises on the plea of tender and the bringing the money into Court; but the case

(a) 3 Barn. & Cress. 636.

(b) 1 Salk. 118; S. C. 2 Ld. Raym. 1006.

of *Cox v. Parry* (a) is decisive to shew that payment of money into Court does not admit an illegal demand or beyond the sum actually paid in. So, here, the defendant, by tendering 10*l.*, has only admitted that the plaintiff is entitled to that sum, but to nothing more; and in *Blackburn v. Scholes* (b), the payment of money into Court on a declaration for goods sold and delivered, was held not to amount to an admission of the plaintiff's interest in the goods beyond the sum paid in, although he had previously delivered a particular of his demand, specifying the parcels of goods, in respect of which the action was brought. The main distinction is between payment of money into Court, on a special contract, and on the general or common counts in *assumpsit*; and here, the defendant has only admitted his liability to the plaintiff to the extent of the sum paid in; and, in the absence of other evidence, he had a right to apply it to either of the items of the plaintiff's demand he thought proper; and, if he had paid it on the last, he would not thereby have admitted that his wife had authority to contract for, or that he assented to the purchase of, any of the articles charged in the prior items. Suppose a coachman had no authority from his master to purchase corn for the stable, and he had ordered and taken in a quantity in his master's name, a part of which might have been consumed by his horses, the master, by paying the value of the quantity so consumed, would not render himself liable for the whole, or for any corn which might be supplied afterwards without his authority or assent. So, here, as there were six different items in the plaintiff's bill of particulars, the defendant, by the payment into Court, might admit that he had authorized his wife to contract for one, but not for the others.

Lord Chief Justice BEST.—I am of opinion that there

(a) 1 Term Rep. 464.

(b) 2 Camp. 341.

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ought to be a new trial. My brother *Burrough* left the question most correctly to the Jury, as far as it regarded the liability of the defendant, and, in all probability, as I should have done; but he gave too much effect to the payment of money into Court. On looking at the circumstances of this case, independently of that fact, there can be no doubt but that the defendant was, in point of law, entitled to a verdict. A husband is only answerable for debts contracted by his wife, on the assumption that she acts as his agent. If he does not furnish her with sufficient necessaries according to her rank and station in life, there is an implied authority that she is his agent to that extent, and that she may contract for or purchase them: but, if she be adequately supplied, she is not his agent for the purchase of even a single article, unless an express authority be shewn to have been given by the husband, or an authority can be implied by his seeing her wear the articles furnished without expressing any disapprobation; which may, in point of fact, be considered as equivalent to an assent. Here, however, it is quite clear that the defendant furnished his wife with every thing necessary for her dress, and suitable to her situation in life, and not only that he gave her no authority to contract with the plaintiff, but that he was ignorant that she had ever dealt with him. No article was delivered, or even proved to have been worn by his wife, in his presence; neither did the female servants in the family, nor the one who attended her, know that such articles had been furnished: nor indeed could they, for they were all delivered to the wife at the plaintiff's shop, with the exception of one parcel, which she herself took in at the door of the house occupied by her husband. He, therefore, neither assented to her contracting with the plaintiff in the slightest degree, nor did he countenance or recognise any of the purchases she had made of him. If, therefore, money had not been paid into Court, it is quite clear that the defendant would have been entitled to a ver-

dict. What, then, is the effect of that payment? I was at first embarrassed by the argument of my brother *Taddy*, who insisted, that the wife must be considered as an agent or servant, and that, if he were authorized by his principal or master to discharge one debt, it might give him an implied authority to contract for another; and that, at all events, a payment of money into Court by the master, would, in effect, admit the validity of such a contract. But I was relieved from this difficulty by my brother *Wilde*, who put it on the ground, that, if the defendant had paid money into Court on the three first items of the plaintiff's bill, he would have acknowledged that his wife had authority to contract, or that credit might be given to her at the date of those items; and that, if no notice had been given to the plaintiff not to furnish any more articles to her, such payment would amount to an admission that she had authority to contract for the remaining items. But from the evidence adduced at the trial, we cannot ascertain whether the money was not paid in on the three last items, and if so, there was no recognition of the wife's agency as to the three first. The effect of the payment into Court, therefore, extends only to the amount of the sum actually paid in, but it recognizes no agency in the wife to purchase at the time the first items in the account were contracted for or supplied. On these grounds, I am of opinion, that more effect was given to the fact of the payment of money into Court than was necessary; and if no stress had been laid upon it, it is quite clear that there would have been no pretence for this action, as it is impossible to doubt that the wife was in all respects sufficiently supplied by her husband, and that she had no implied authority from him to make the purchases in question, as all the articles were delivered to her clandestinely and without his privity or knowledge, or subsequent assent. It may be said that it is a hardship on a milliner, if she be not allowed to trust a lady for articles of dress without putting her to the ex-

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pense or necessity of previously enquiring into her circumstances, or whether she were authorized to contract. We, however, are not to attend to mere questions of delicacy, but are bound to protect husbands and fathers of families against the extravagance or wanton expenditure of their wives, and to follow the rule already adopted,—that a tradesman shall not be allowed to recover against the husband for articles furnished to the wife, if he allow her a sufficient supply, and the tradesman make no enquiry as to her capacity to contract.

Mr. Justice GASELEE (*a*).—I shall wholly abstain from making an observation on any of the facts of this case, as I concur with my Lord Chief Justice in thinking that there ought to be a new trial. It is difficult to lay down any abstract rule as to the caution necessary to be observed by a tradesman, or the liability of a husband for articles furnished to his wife. Very frequently, a husband does not know whether or not his wife may be properly supplied with necessary articles of dress or ornament; but leaves it to her discretion to procure them, and pays the amount of the bills when delivered. But, with respect to the payment of the money into Court I entertain no doubt. I have always understood the rule on bringing money into Court to be, that, if the payment be made on a general count in *assumpsit*, it only amounts to an acknowledgment by the defendant of the plaintiff's right of action to the amount of the sum brought in, and does not preclude the defendant from taking any objection to the legality of the contract, in order to prevent the plaintiff from recovering beyond that sum; and, consequently, it is an admission of a legal demand only; but that, if the declaration contain a special contract, the bringing of money into Court general-

(*a*) Mr. Justice Park was at the Old Bailey, and Mr. Justice Burrough declined giving any opinion.

ly is an admission of the contract, so as to supersede the necessity of the plaintiff's proving it at the trial, as the only question is as to the amount actually due under the contract. Besides, a special contract forms one entire cause of action; and, as the action of *assumpsit*, though founded upon contract, is strictly in the nature of *tort*, the breach is admitted by the payment of money into Court, and that is the *substratum* of the action. Here, however, the plaintiff's demand was made up of several distinct items for goods supplied at different times; and the defendant might say that he had authorized part of them to be contracted for by his wife, but not the remainder; and the payment into Court only admits that the plaintiff was entitled to recover to the amount of the sum paid in. In the cases of *Cox v. Parry*, *Blackburn v. Scholes*, and *Bennett v. Francis*, the plaintiff's causes of action were founded on special contracts, and, consequently, arose out of single transactions, the mere validity of which were admitted by the payment of money into Court. I, therefore, think, that, in this case, too much effect was given to the plea of tender, and the payment of the money into Court. The facts as to the defendant's liability, independently of that, were most properly left to the Jury; but, in all probability, they were embarrassed by what fell from my brother *Burrough*, with regard to the payment into Court. If no remarks had been made upon it, the verdict might, and I think ought to have been the other way; still, as the damages are under 20 $\%$, we ought not to disturb it, unless we thought that the Jury felt a difficulty as to the effect of the tender. Of that I have no doubt. The rule for a new trial must, consequently, be made—

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Friday,
June 13th.

A declaration in replevin alleged that the defendant, in the parish of *A.*, in the county of *Kent*, in a certain close there, took the plaintiff's cattle.

Special demurrer, that it did not appear in what particular place in the parish the cattle were taken, whereby the defendant was prevented from making a proper defence, and from taking issue upon the place of taking: —It seems that the close should have been described by name or by abutments; but the plaintiff had leave to amend by inserting the name, the costs to abide the event of the cause.

POTTEN v. BRADLEY.

THIS was an action of replevin. The declaration stated, that the defendant, on the 27th *September*, 1826, in the parish of *Aldington*, in the county of *Kent*, in a certain close there, took the cattle, to wit, forty-seven lambs of the plaintiff, of great value, to wit, of the value of 100*l.*, and unjustly detained the same, against sureties and pledges, &c.

The defendant demurred specially, assigning for causes, that it was not alleged, nor did it appear by the declaration, in what particular place or places in the said parish, in the declaration mentioned, the said cattle or any part thereof were taken; whereby the defendant was totally prevented from making a proper defence to the said declaration; and, from the want of naming or mentioning in the declaration, the place or places where the said cattle or any part thereof, were above supposed to have been taken, the defendant was prevented from taking any issue upon the place of taking, &c. The plaintiff joined in demurrer.

The cause now came on for argument.

Mr. Serjeant *Russell*, in support of the demurrer.—The action of replevin requires more certainty in the description of the place where the distress is taken, than an action of trespass or any other action, as the place is material and traversable; and, if the defendant plead *non cepit*, or *cepit in alio loco*, if the plaintiff cannot prove that he took, or that the defendant had the cattle, in the place alleged in his declaration, he must be nonsuited. In *Ward v. Lavile* (a), the plaintiff counted of the taking *apud Dale*, without alleging any certain place, (the usual course being to say *in quodam loco vocat. &c.*), and for

(a) Cro. Eliz. 896; S. C. Moore, 678.

this cause the defendant demurred; the Court held the count to be ill; as the place is put in the count to give notice to what the defendant should make his title and answer, and vill is too general and uncertain. So, in *Read v. Hawke* (a), it was held, that, in replevin, a plaintiff must assign in his declaration the place where the cattle or goods are taken, and that a town is not sufficient, on the grounds, that, as well the place as the town is traversable by the averment, and that replevin differs in this respect from an action of trespass, as it is an action of more certainty. In *Walton v. Kersop* (b), the plaintiff declared for taking his cattle in *Market Street* ward, and the defendant pleaded *non cepit*; and Lord Chief Justice *Wil-*
not said: "At this day (*viz.* 1767), it is very clear that the vill and place where the cattle are taken must be laid in the declaration. If there is no place the defendant may demur." In *Bullythorpe v. Turner* (c), the plaintiff declared for taking his goods at the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, in *London*; and Lord Chief Justice *Willes* said, (the defendant having pleaded over), "The declaration is certainly not good, because it does not set forth the place in which the goods were taken, which it ought to have done, that the defendant might know with certainty to what he is to answer; and, therefore, if the defendant had demurred, judgment in chief must have been given against the plaintiff, and a return of the goods awarded, as was holden in *Ward v. Lavile*, and *Read v. Hawke*. But it is said there, and the law to be sure is, that, if the defendant plead over, this defect is cured." In a note by Mr. Serjeant *Williams* to *Potter v. North* (d), he says, "It is necessary in replevin to mention the *place* of taking, as well as the vill or parish, otherwise the de-

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(a) Hobart, 16.

(b) 2 Wils. 354.

(c) Willes, 475.

(d) 1 Wms. Saund. 4th Edit.
347, (n).

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defendant may demur, but the omission is cured by pleading over, or after verdict. The place, and vill or parish, are material and traversable; and, where the defendant took the goods in another place than is mentioned in the declaration, he may plead *non cepit*, and give that fact in evidence, and nonsuit the plaintiff. Replevin differs from trespass *quare clausum fregit*, as, in the latter, it is held to be sufficient for the plaintiff to allege the trespass to have been done in a vill or parish only, without mentioning any place, for it is not material; and, if the plaintiff do mention a place, the defendant may justify in another place without a traverse, and the plaintiff must ascertain the place in a new assignment. But, as there can be no new assignment in replevin, and it is also an action which requires greater certainty in the declaration, the plaintiff is bound to mention the place of taking at first in his declaration:—and here, he would neither have experienced inconvenience, nor have been put to expense in setting out the name of the close in which the cattle were taken.

Mr. Serjeant *Merewether, contra*.—The close in question might have had no name, and there is no case or precedent to shew that the description in the declaration was insufficient, as the plaintiff not only mentioned the parish where the cattle were taken, but stated, that they were in a *certain close* there. The place, therefore, as well as the parish, was mentioned, and it was not necessary to set it out by metes and bounds. In *Pope v. Tilman* (a), the declaration stated that the defendant, in the parish of *Pillaton*, in the county of *Cornwall*, in a *certain dwelling-house* there, took the plaintiff's goods, and no objection was made as to the description of the place, but only as to the goods. Now, a close or common is equally descriptive of the place where cattle are taken, as a messuage or dwelling-house

(a) 1 B. Moore, 386.

in which goods may be found.—The learned Serjeant was proceeding with his argument when he was stopped—

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By the Court—who said, that, although, where a plaintiff in replevin omits to name the particular place in the declaration, the defect may be cured by the defendant's pleading over, or by verdict; still, that there had been no case in which it had been decided that the objection might not be raised by demurrer; that it was most convenient that a name or description should be given of the close in which the cattle were taken; and that, if it had no name, it might be described by abutments, or as being in the occupation of *A. B.* The defendant could not plead *cepit in alio loco*, for, if the plaintiff proved that the defendant's cattle were in a close in the parish of *Aldington*, he would be entitled to a verdict, notwithstanding the first taking was in another place.

The learned Serjeant then consented to amend the declaration, by inserting the name of the close; and the Court ordered the costs of the demurrer to abide the event of the cause.

The rule to amend was drawn up accordingly (a).

(a) See Chitty on Pleading, 2d. Edit. Vol. 2, p. 411, n.

CROFTS v. EDWARD STOCKLEY and PAUL STOCKLEY.

Friday,
June 13th.

THIS was an action of debt on a bail-bond, brought by the plaintiff, as assignee of the Sheriff of *Northamptonshire*,

In an action on a bail-bond, by the assignee against the sureties, the declara-

tion stated the arrest of the principal by virtue of a *capias* sued out of the Court of our Lord the now King, before &c., then *his Majesty's Justices of the Bench*, at *Westminster*; and averred the condition of the bond to be, that, if the principal should appear, according to the exigency of the said writ, in the said Court, on &c., the bond was to be void: breach—non-appearance according to the exigency of the writ. On the production of the bond, the condition was for the appearance of the principal "before our Sovereign Lord the King, at *Westminster*, on &c., to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of the King's Court of Common Bench:"—Held, to be no variance.

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against the defendants, as sureties of one *William Wright*. The declaration stated,—that the plaintiff, on &c., in the eighth year of the reign, &c. sued and prosecuted out of the Court of our Lord the now King, before the Right Honourable Sir *William Draper Best*, Knight, and his companions, then his Majesty's Justices of the Bench at *Westminster*, in the county of *Middlesex*, a certain writ of our said Lord the King, to wit, a *capias ad respondendum*, against one *William Wright*, directed to the Sheriff of *Northamptonshire*, by which said writ our said Lord the King commanded the said sheriff that he should take the said *William Wright*, if he should be found in his bailiwick, and him safely keep, so that the said Sheriff might have his body before *the Justices* of our said Lord the King at *Westminster*, on the morrow of *All Souls* then next ensuing, to answer the plaintiff of a plea of trespass; and also that the said *William Wright* might answer the plaintiff according to the custom of his said Majesty's Court of *Common Bench*, in a certain plea of debt for 400*l.*; and that the said Sheriff should have there that writ. The plaintiff then averred, that the writ was duly indorsed for bail for 2*l.* and upwards, and delivered to the Sheriff to be executed; by virtue of which he arrested *Wright*, and took bail for his appearance at the return of the writ; and that the defendants, as bail and sureties for *Wright*, entered into and executed a bail-bond to the Sheriff, the condition of which was, that, if *Wright* should appear according to the exigency of the said writ, in the said Court, on the morrow of *All Souls*, to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of his said Majesty's Court of *Common Bench*, in a certain plea of debt for 400*l.*, the bond should be void. The plaintiff then averred, that *Wright* did not appear according to the exigency of the writ, whereby the bond became forfeited, and was afterwards indorsed and assigned by the Sheriff to the plaintiff.

Plea—*non est factum*.

At the trial, before Mr. Justice *Park*, at *Westminster*, at the Sittings after the last *Hilary* Term, on the production of the bond, the condition was, that “ if *Wright* appeared before our said Sovereign Lord the King, at *Westminster*, on the morrow of *All Souls* next coming, to answer the plaintiff in a plea of trespass, and also to answer the plaintiff according to the custom of the King’s Court of *Common Bench*, in a certain plea of debt for 400*l.*, the bond was to be void.

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For the defendants, it was objected, that there was a material variance between the condition of the bond given in evidence and that set out in the declaration, the one being for *Wright* to appear before our Sovereign Lord the King, at *Westminster*; the other for his appearance according to the exigency of the writ, by which the Sheriff was directed to have his body before the Justices of the King, at *Westminster*.

The learned Judge, however, over-ruled the objection, and directed the Jury to find a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit.

Mr. Serjeant *Ludlow*, in the last Term, accordingly obtained a rule nisi that this verdict might be set aside and a nonsuit entered, on the objection taken at the trial: in support of which, he observed, that, in declaring on a bail-bond it was necessary to set out the condition of the bond in terms, and to assign a breach by the non-appearance of the party in the Court, as specified, and on the day in the condition mentioned, according to the exigency of the writ; whilst here, the latter words only were introduced. And he cited the cases of *Mill v. Pollon* (a), *Impey v. Taylor* (b), and *Renalds v. Smith* (c); in the latter of which, a

(a) 1 B. Moore, 19; S. C. 7 Taunt. 271.

(b) 3 Mau. & Selw. 166.

(c) 2 Marsh. 258; S. C. 6 Taunt. 551.

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bail-bond conditioned for the defendant's appearance before his Majesty, at *Westminster*, was held to be a condition to appear in the Court of *King's Bench*.

Mr. Serjeant *Merewether* now shewed cause.—The declaration recites the writ by which the Sheriff was commanded to take *Wright*, and have his body before the *Justices* of our Lord the King, at *Westminster*, on the morrow of *All Souls*. The writ, therefore, is correct, and, although the bond was conditioned for the appearance of *Wright* before our said Sovereign Lord the King, at *Westminster*, omitting the words “*the Justices of*,” yet, the condition clearly refers to the writ, as it sets out in terms the *ac etiam* clause, by which *Wright* was required to answer the plaintiff according to the custom of the King's Court of *Common Bench*. Coupling, therefore, the *ac etiam* clause, as set out in the condition, with the writ previously recited in the declaration, it is evident that the condition was meant to be for *Wright's* appearance in the Court of *Common Pleas*. At all events, it is sufficiently alleged in substance in the declaration, which states, that *Wright* was to appear according to the exigency of the writ, the *ac etiam* clause of which exactly corresponds with the condition of the bond.

Mr. Serjeant *Ludlow*, in support of his rule.—If the condition of the bond had been set out in terms as it ought, the declaration would clearly have been demurrable, according to the case of *Renalds v. Smith*, where the like objection was raised on general demurrer. The condition, at all events, ought to have been set out according to its legal effect, which was for *Wright's* appearance before our Lord the King, at *Westminster*, to answer the plaintiff in a plea of trespass; and that must of necessity be taken to apply to the Court of *King's Bench* alone; and, although the *ac etiam*, as set out in the condition, may correspond with the writ, it cannot have the

effect of curing so palpable a mistake or omission. In *Impey v. Taylor*, the plaintiff alleged in his declaration that an action had been brought, and was depending in his Majesty's Court of the *Bench*, at *Westminster*, and it was held not to be sustained by proof of a bill of *Middlesex*; as, by such allegation, the Court of *Common Bench* must be intended: and in *Sheldon v. Whittaker* (a), in an action against the Sheriff, on the statute 8 *Anne*, c. 14, for removing goods seized without satisfying the landlord's rent, the declaration stated the *fieri facias* to have been sued out in the Court of *King's Bench*, and it appeared in evidence to have issued out of this Court: it was held to be a fatal variance. It is, therefore, necessary to set out the style of the Court correctly; and here there was nothing on the face of the declaration to connect the condition of the bail-bond with the previous recital of the writ.

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Lord Chief Justice BEST.—I am of opinion, that, taking the whole of the declaration together, enough appears to show that the bail-bond was taken for the appearance of *Wright* in this Court. It is so alleged in substance. In *Renalds v. Smith*, Lord Chief Justice Gibbs said (b): “Taking the whole record together, to see whether the sureties could understand that this was a bond requiring them to render the principal in the *Common Pleas*, there appears to be nothing to shew that such was the obligation.” Here, however, enough appears to shew the converse of that. At all events, it is alleged in substance that the bond was conditioned for the appearance of *Wright* in this Court; and that sufficiently appears on the face of the instrument itself.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

(a) 1 Ry. & Mood. 266; S. C. R. yl. 123.
4 Barn. & Cress. 657; 7 Dow. & (b) 2 Marsh. 261.

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Mr. Justice GASELEE.—The bond is conditioned for the appearance of *Wright* before our Lord the King, at *Westminster*, on the morrow of *All Souls* next coming, to answer the plaintiff in a plea of trespass, and also according to the custom of the King's Court of *Common Bench*; and, although the words “the Justices of” are omitted in the former part of the clause, yet there is sufficient to shew that this Court was intended. In *Renalds v. Smith*, the condition of the bond was only for the appearance of G. S. before his Majesty, at *Westminster*, which Lord Chief Justice *Gibbs* said could only be taken to point out the Court of *King's Bench*, though followed by the words “at *Westminster*.”

Rule discharged.

Saturday,
June 14th.

LEES v. WHITCOMB.

The plaintiff sued the defendant in *assumpsit* for the breach of the following written agreement, signed by the latter, viz. “I hereby agree to remain with Mrs. L. (the plaintiff's wife) for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c.:—Held, that this agreement did not support a declaration stating, that, in consideration that the plaintiff, at the request of the defendant,

would receive her into his service, and cause her to be taught the business of a dress-maker, she agreed to remain in such service for the space of two years: nor was such agreement binding, as it contained no engagement by the plaintiff or his wife to teach.

THIS was an action of *assumpsit* for the breach of an agreement. The first count of the declaration stated, that, before and at the time of making the agreement therein-after mentioned, the plaintiff's wife was, and from thence hitherto had been and still was a dress-maker and milliner, and that, thereupon, on the 5th June, 1826, in consideration that the plaintiff, at the request of the defendant, would receive the defendant into his house, and find and supply her with board and lodging, and cause her to be taught the trade and business of a dress-maker and milliner by the plaintiff's wife, the defendant agreed and undertook and promised the plaintiff to remain and continue with his wife for two years from the day and year aforesaid, for the purpose of learning the business of a dress-maker and milliner. The plaintiff then averred, that he, confiding in the defendant's promise, received her into his house, and that

she remained there for a long time, to wit, from the said 5th *June*, 1826, until the 14th *April*, 1827; and that, during the time she so remained, the plaintiff supplied her with *board and lodging and other necessaries*, and caused her to be taught by his wife the trade and business of *a dress-maker and milliner*; that, although the plaintiff was ready and willing to have suffered the defendant to have continued for the remainder of the two years, and would have supplied her with board, &c. and taught her the trade and business of *a dress-maker and milliner*; yet, that the defendant did not, although requested so to do, remain or continue with the plaintiff's wife, or in his house, but, on the contrary thereof, before the expiration of the said two years, to wit, on the said 14th *April*, the defendant, without the licence or consent of the plaintiff and his wife, or either of them, and against their will, left the plaintiff's house, and the service of him and his wife, and continued absent, whereby he had lost and been deprived of the profits which he would have otherwise derived from her service and assistance.

The second count was similar to the first, with the exception of omitting the words "other necessaries" after those of "board and lodging," and stated, that the plaintiff received the defendant into his *service*, instead of his house.

In the third, the plaintiff's wife was described as *a dress-maker* only, omitting the word "*milliner*."

The fourth stated, that, in consideration that the plaintiff, at the request of the defendant, would receive her into his service and cause her to be taught the business of *a dress-maker and milliner* by the plaintiff's wife, the defendant agreed and promised the plaintiff to continue with his wife for two years from the 5th *June*, 1826, for the purpose of learning the business; that the plaintiff received the defendant *into his service*, and that she was instructed by his wife; that the defendant stayed *in his service* until the 14th *April*, 1827, and refused to remain afterwards, or for the remainder of the term of two years.

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The fifth stated, that, before and at the time of the making of the agreement therein-after mentioned, the plaintiff's wife was a *dress-maker*; and that, in consideration that the plaintiff, at the request of the defendant, would receive her *into his service*, and cause her to be taught by the plaintiff's wife the business of a *dress-maker*, the defendant agreed to remain in such service for the space of two years, for the purpose of learning the business; that the plaintiff received her into his service, and that she remained until the 14th *April*, 1827; that his wife taught, and was ready to teach her the business of a dress-maker, for the remainder of the two years, but that she refused to remain or continue with his wife, or in the plaintiff's service, whereby he lost the profits which he would and might have derived from her service and assistance.

The sixth count was for work and labour in teaching and instructing the defendant, and for meat, drink, washing, lodging, &c. &c.

To these were added counts for work and labour generally by the plaintiff and his wife; and the usual money counts.

The defendant pleaded the general issue.

At the trial, before Mr. Justice *Park*, at *Westminster*, at the Sittings after the last *Hilary* Term, the plaintiff gave in evidence the following agreement in writing, signed by the defendant.

" I hereby agree to remain with Mrs. *Lees*, of 302 *Regent Street, Portland Place*, for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c. As witness my hand this 5th day of *June*, 1826.

Amelia Whitcomb."

This agreement was attested by two witnesses, and the plaintiff proved that the defendant came to his house on the day therein specified, and that she quitted him on the 14th *April* following, by which time she had made great progress in learning the business of a dress-maker; and that her services were then valuable to the plaintiff. It

appeared that he received no premium with her, and that she resided with her mother, but came to the plaintiff's house every morning at eight or nine o'clock, and remained there till ten at night, and sometimes so late as twelve or one, in which case one of the plaintiff's servants went home with her; and that, since she had left the plaintiff, she had commenced business on her own account.

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For the defendant, it was objected, that the plaintiff was not entitled to recover, on three grounds,—*first*, that there was no mutuality in the agreement;—*secondly*, that, even if there were, there was no consideration apparent on the face of it;—and *lastly*, that neither of the counts in the declaration could be supported, as the contract was in all of them stated improperly, and inconsistently with the terms of the agreement. In point of fact, there was no contract or engagement on the part of the plaintiff to teach, so as to raise a consideration for the defendant's promise to remain. She merely contracted to learn, but no one was bound to give her instruction; nor does the agreement import that her service was to be beneficial to the plaintiff; and it cannot be inferred, that a person learning will benefit the party teaching. A contract with a dress-maker and milliner cannot be treated as a contract with a dress-maker only, as the two branches of business are quite distinct; nor was there any contract on the part of the plaintiff to receive the defendant *into his house or service*, or supply her with board and lodging, or cause her to be taught the business of a dress-maker, or milliner.

The learned Judge, considering the objections to be well founded, directed a nonsuit, reserving leave to the plaintiff to move to set it aside, and that a new trial might be granted, in case the Court should be of opinion that the declaration could be supported by the terms of the agreement.

Mr. Serjeant *Taddy*, in the last Term, accordingly ob-

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tained a rule *nisi*. He submitted, that, as the plaintiff had taken the defendant into his house, and she had remained with him from *June*, 1826, to *April*, 1827, the agreement had been acted upon and executed; that the defendant having agreed to learn a trade or business, a contract to teach her must be implied, and, if the plaintiff had refused to do so, she would have had her remedy by action; that a contract on his part to teach must have been made antecedently to the defendant's agreeing to *remain with* the plaintiff's wife to learn; and that, whilst she continued, the relation of mistress and teacher existed on the one hand, and that of pupil or apprentice on the other.

Mr. Serjeant *Wilde* now shewed cause. All the counts but the *fifth* are wholly inconsistent with the terms of the agreement, and that was not supported by the evidence. There is a wide distinction between a contract to learn and a contract to serve. A schoolmaster who receives pupils, takes them for the purpose of instructing them, and does not anticipate that they will ever render him any service, nor are they bound to serve, their only duty being to learn. So, the being taught a trade is an advantage to the learner alone, but of no benefit to the teacher or instructor; and here, the defendant was received by the plaintiff as a pupil or apprentice, to be instructed in the art of dress-making, and not as a servant; and yet, the *fifth* count avers the consideration to be his taking or receiving her *into his service*. There was not only no contract for service, but it was not even contemplated by the parties, nor can it be inferred from the terms of the agreement. At all events, the consideration should have been set out correctly on the face of the declaration. The object of the parties was, that the defendant should be received as the pupil of the plaintiff's wife, for the sole object of learning the branch of business she carried on, *viz.* that of a dress-maker; and, if the defendant had re-

mained with her two years, her services would, no doubt, have been valuable before the expiration of that period. But there is no consideration for the defendant's promise or agreement to remain with Mrs. *Lees*, either express, or to be implied from the terms of the agreement, which is absolutely necessary since the decision of the Court of *King's Bench* in *Wain v. Warlters* (a), which was fully recognised and adopted in the subsequent cases of *Saunders v. Wakefield* (b), and *Jenkins v. Reynolds* (c). As the contract was not to be performed within a year, the statute of frauds requires not only that it should have been in writing, but that the whole of the consideration for the promise, as well as the promise itself, should appear on the face of the instrument, in order to charge the defendant; and here, no obligation whatever was imposed on the latter to serve the plaintiff, nor did he himself engage or undertake to teach her the business, but she was to remain with his wife for the purpose of being instructed; nor did he sign the instrument as a party to be charged, but the defendant alone signed it. The relation of master and servant is altogether distinct from that of instructor and pupil; and here, as the defendant merely agreed to remain with the plaintiff's wife, for the purpose of *learning* the business of a dress-maker, she was under no obligation to *serve*.

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Mr. Serjeant *Taddy*, in support of his rule.—Although the *fourth* count may be objectionable, as the plaintiff's wife was described therein as a dress maker and milliner, and in the agreement as a dress-maker only, yet the plaintiff is entitled to recover on the *fifth* count. It must be assumed, that the defendant's agreeing to remain with the plaintiff's wife for two years was a beneficial service, and the defendant could not learn unless there were an implied engagement or undertaking on the part of the plaintiff

(a) 5 East, 10.

(b) 4 Barn. & Ald. 595.

(c) 6 B. Moore, 86.

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to teach. The defendant was wholly unacquainted with the art of dress-making when she first came to the plaintiff's house, and if she had remained for the term of two years, as agreed on, she would have been of great service; as she would have acquired a knowledge of the business long before that period had expired. The object of the parties was, not that the defendant should merely learn the business, but that she should remain for two years; and the word *service*, as used in the fifth count, must be taken to apply to a continuing service, or staying with a person who is to give instruction; as the word *remain* shews that the defendant was to continue with her mistress for two years, whether she had learnt the business or not, and she might have made herself mistress of the art of dress-making in a few months; and it is manifest that she did so, as, when she quitted the plaintiff, she set up in business for herself. In the case of *The King v. The Inhabitants of St. Margaret's, King's Lynn* (a), it was agreed that a pauper should serve for four years, but no indentures of apprenticeship were executed, in consequence of the poverty of his mother, and it was held that it was a defective contract of apprenticeship, and not a contract of hiring; Mr. Justice *Bayley* saying, that, "at the time the contract was made, the parties might have contemplated the relation of master and apprentice, or that of master and servant. The object held out by the master was, that he would teach the pauper his trade, and he was to serve four years for that purpose; and, although the object of the pauper was to be taught, the master only agreed to teach him upon condition that the pauper would work for a given time; and, in many instances, the object of the party who hires himself, is to learn a particular trade, and the instruction he receives is a partial remuneration for his services:" and Mr. Justice *Holroyd* said:

(a) 6 Barn. & Cress. 97.

“ Mere service does not constitute the relation of master and servant.” So, here, the word *service* may equally apply to a contract to teach, or an agreement to learn a business; and, although it has been objected, that there is no mutuality, nor any thing to bind the plaintiff to teach, yet the defendant engaged to remain to learn the business; and her continuing with the wife for two years must be considered beneficial to both parties. Although it has been said, that the plaintiff is not entitled to recover, as he did not sign the agreement; yet, the signature by the party to be charged is sufficient; for, in *Egerton v. Matthews* (a), a memorandum signed by a party, whereby he agreed to give a certain sum for goods, was held sufficient to take the case out of the statute of frauds, although it was not signed by the seller, nor did it express any consideration for the defendant’s promise, otherwise than by inference from his own obligation. The amount of the consideration is wholly immaterial; and, although the plaintiff may not be deemed entitled to recover under the special counts, he is, at all events, entitled to a verdict on those for work and labour in instructing the defendant, or teaching her the business of a dress-maker, as she was qualified to set up for herself before the expiration of the two years, for which period she expressly agreed to remain with the plaintiff’s wife.

Lord Chief Justice BEST.—I am of opinion that neither of the counts in this declaration were proved, and I am further of opinion that the plaintiff is not entitled to recover on the general counts for work and labour: no such point was raised at the trial. There is no pretence for saying that any sum was to be paid for teaching or instructing the defendant; and it has been admitted by my brother *Taddy*, that only the fourth or fifth counts are applicable

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(a) 6 East, 307.

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to the plaintiff's case; and although it may be said that it is of the greatest importance to his establishment, that the ladies forming it should know that they are bound to remain during the time stipulated for, yet he ought to have procured such a contract as would make it binding on both parties. This, however, is not a contract of that nature, nor is its meaning expressed in either of the counts of the declaration. It is quite clear that the fourth count cannot be supported, as the plaintiff's wife is therein described as a dress maker and milliner, and there is a material distinction between those two branches of business. The one applies to a person who makes articles of dress, the other, to a maker of caps and bonnets, or other articles of taste. The art was first introduced at *Milan*, in *Italy*, from which the term milliner is derived. It appears to me to be equally clear that the fifth count cannot be supported, either by the terms of the agreement, or the evidence adduced at the trial. It states, that, in consideration that the plaintiff, at the request of the defendant, would receive her into his service, and cause her to be *taught* the business of a dress-maker, she agreed to remain in such service for the space of two years. The consideration is not truly stated in that count, for there is nothing in the agreement to shew that the plaintiff was to receive the defendant into his service; for the words of the contract are, that she agreed to remain with his wife for two years, for the purpose of *learning* the business of a dress-maker. There is, consequently, no such consideration as is stated in that count; for the defendant merely engaged to remain with the plaintiff's wife for two years, to learn the business.

The next ground of objection to the plaintiff's right to recover, is, that there was no obligation on the defendant to serve. I admit it is not necessary that a person must be a servant, in the strict sense of the word; it may apply to a hiring by contract, as well as to a servitude by

apprenticeship. The meaning and application of the word servant, was at first limited to slaves or vassals, but it may now be extended to a service of any description. Here, however, there was no undertaking by the defendant to serve. It is true, that, if a milliner were to agree to take a young lady into her house for the purpose of acquiring a knowledge of her business, and stipulate that she was not to leave her, and set up against her when she had learned it, or that she should not quit until the expiration of two years, and the party left and commenced business for herself before the expiration of that period, an action might be maintained against her. So, if it had been stated in the declaration, that the plaintiff undertook to receive the defendant into his house to learn the business of a dress-maker, in consideration that she would remain with him for the space of two years for that purpose, it might have been a good consideration, and she could not have left the plaintiff, or have set up for herself, within that period. But it is stated that the plaintiff was to have the value of the services of the defendant. That is the consideration laid in all the counts, and there is not a syllable as to such service in the agreement, or by which the defendant stipulated to render any service to the plaintiff. She might have refused to work at all, as she was only to remain with the wife for the purpose of learning. She was not thereby to become a servant or apprentice, but only to continue two years; and the breach in both the fourth and fifth counts is, that she left the plaintiff's service before the two years had expired, and that thereby the plaintiff lost and was deprived of the benefit of her services. There was no consideration moving from the plaintiff to require the defendant to serve; and I am therefore of opinion that the contract was not proved, nor was it well laid in either of the counts of the declaration. The rule for setting aside the nonsuit must therefore be discharged.

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Mr. Justice BURROUGH (a).—Since the case of *Wain v. Warlters*, which has been confirmed by *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, it is quite clear, that the consideration for the defendant's promise or undertaking should have appeared on the face of the agreement by which she is sought to be charged. None however was expressed, and that appears to me to be of itself an answer to the plaintiff's right to recover.

Mr. Justice GASELEE.—Although I felt considerable difficulty at first, yet it is not now so strong as to induce me to differ from the opinions expressed by my Lord Chief Justice, and my Brother *Burrough*. The declaration might have been differently framed; the service in the fifth count is alleged as a general service, and not as a service for the purpose of teaching the defendant the business of a dress-maker.

Rule discharged.

(a) Mr. Justice *Park* declined giving any opinion.

Monday,
 June 16th.

HILLS v. STREET.

A broker having seized goods under a distress for rent, the tenant desired time, and that the broker would not remove or sell; on which the latter required the tenant to sign written

THIS was an action of *assumpsit* for money had and received, brought to recover from the defendant, a broker, the sum of 19*l.* 5*s.*, which the plaintiff alleged he had paid to the defendant for his charges on levying a distress for rent on the plaintiff's goods, and which charges he contended were illegal and excessive.

requests from time to time, by which he also engaged to pay the charges of the levy, and the expenses of keeping a man in possession. The goods were not removed, and the broker applied for and obtained those charges, but the tenant objected to the amount, as well as to the sum alleged to be due for rent:—*Held*, that the payment by the tenant was not a voluntary payment, and that, if the charges were illegal or excessive, he might recover them back in an action for money had and received.

At the trial, before Mr. Justice *Gaselee*, at *Westminster*, at the Sittings after the last *Michaelmas* Term, it appeared, that, on the 28th *April*, 1827, the defendant, as the broker of one *Elwes*, distrained on the plaintiff's goods for 230*l.* 10*s.*, alleged to be due from the plaintiff to *Elwes*, for seven quarters' rent of a house occupied by the former, in *Upper Rathbone Place*; that the defendant put a man in possession, and, before the expiration of the five days allowed for replevying, the plaintiff, having previously alleged that six quarters' rent only were due, as he was entitled to have a deduction made for expenses incurred and paid by him in consequence of a fire which had lately happened on the premises, and for which expenses his landlord was liable, sent a request to the defendant that the man might remain, to which the defendant acceded, on the terms of the plaintiff's signing a request in writing, drawn by the defendant, by which the plaintiff was to engage to pay the charges for levying the distress, and the expenses of keeping the man in possession; and on the plaintiff's acceding to those terms, and signing the paper, the defendant allowed the goods to remain on the premises. The plaintiff having signed three other similar requests, drawn by the defendant, and the rent not having been satisfied, he, on the 18th *May*, on the application of the defendant, paid him 8*l.* 5*s.* for his commission, as a broker, for taking an inventory and valuing the goods distrained for 230*l.* 10*s.*, being at the rate of 5*l.* for the first hundred, and 2*l.* 10*s.* for every hundred after; and also the sum of 4*l.* 4*s.* for the expenses of keeping the man in possession twenty-one days, at the rate of 4*s.* per day; and the further sum of 1*l.*, for drawing the form of the above four requests, being at the rate of 5*s.* each; and, on the 11th *June*, (the plaintiff having in the interim signed four other requests drawn by the defendant, desiring him not to remove or sell the goods), he paid the latter 4*l.* 16*s.* for the expenses of keeping the man

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in possession; and he had a full knowledge of all the facts attending the distress, before the payments were made, and his sole object was, that the goods should not be removed from the premises, or sold; and the defendant allowed them to remain for the sole purpose of accommodating the plaintiff; and he was consequently entitled to a fair remuneration for his trouble and indulgence.

The Court recommended a *stet processus*; but the parties having refused to accede to it—

Mr. Serjeant *Andrews* was now about to shew cause, when he was stopped by the Court, who called on

Mr. Serjeant *Wilde*, to support his rule.—The payments made by the plaintiff to the defendant, for his charges in levying the distress, and forbearing to sell the goods distrained, were, under the circumstances, voluntary payments, and cannot, at all events, be recovered back in an action for money had and received: for in *Lindon v. Hooper* (a), it was held, that such an action did not lie, to recover back money paid for the release of cattle taken damage feasant, although the distress were wrongful, on the grounds, that the law had provided two specific remedies for trying questions of this description, namely, an action of replevin, or of trespass; and here the plaintiff might and ought to have replevied. In *Knibbs v. Hall* (b), where a party, threatened with a distress for rent, paid a larger sum than it afterwards appeared was due,—Lord *Kenyon* was of opinion, that this could not be deemed a payment by compulsion, as the party might, by a replevin, have defended himself against the distress; and, therefore, that after a voluntary payment, so made, he should not be allowed to dispute its legality. Here, it is evident that the plaintiff only contemplated the means by which he

(a) Cowp. 414.

(b) 1 Esp. Rep. 84.

should be enabled to pay the landlord his rent, and his requesting the defendant to allow a man to remain in possession, shews that he never intended to replevy; and the broker ought to be paid for his trouble in postponing the sale of the goods, and not removing them from the premises. The rent must, at all events, have been satisfied by the plaintiff, as well as all reasonable expenses attending the distress. The payments made by him to the defendant were not to obtain possession of the goods, or to have them re-delivered, but to prevent their sale or removal; and Lord *Kenyon* is stated to have said, in *Fulham v. Down* (c), that, where a voluntary payment is made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, as for the redemption or preservation of person or goods, it is not the subject of an action for money had and received. Here, however, the demand was not only legal and reasonable, but the act of the defendant in delaying the sale or removal of the goods, at the solicitation of the plaintiff, was rightful. The defendant, as a broker, was, at all events, entitled to reasonable charges for the expense and trouble incurred in levying in the first instance, and the charge for making an inventory and valuing the goods was, so far from being exorbitant, a fair and reasonable charge. A sheriff, who levies under a *fiери facias* is entitled to 5 *per cent.* on the first hundred, and 2½ *per cent.* for every hundred after, although he does not proceed to a sale; and the defendant was equally entitled to make such a charge. It would be most unjust and oppressive on a tenant, if a broker were compelled to sell goods distrained on for rent within the five days allowed by law; and here, although it appeared that, on the plaintiff's objecting to the amount of the defendant's charges, he said that the law allowed them, and he would have them; yet they were incurred at the express request of the plaintiff, and he had full knowledge of all the cir-

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cumstances attending the distress, and the situation in which he was placed; and, as the goods would have been ultimately sold, if he had not wrongfully prevented their removal, by refusing admittance to the person who had previously remained in possession, and who had gone out for a caravan, for the purpose of removing them, he is not entitled to favour or indulgence.

Lord Chief Justice BEST.—I am of opinion, that, although the defendant ought to be allowed all reasonable expenses for levying the distress, as well as for making the inventory and valuing the goods, yet such allowance would not turn the scale in his favour, as the Prothonotary has stated to us, that, in case the plaintiff had replevied, the utmost he would have allowed on taxation of costs for the defendant's charge as a broker in levying the distress, would not have exceeded the sum of one guinea. The rule for a nonsuit must consequently be discharged. If it were made absolute, the parties would, in all probability, be put to the expense of another trial, and we ought not to indulge any angry feelings, which, in the end, might have the effect of ruining both. Although, in strictness, the Jury might be warranted in making the allowance to the man who remained in possession, yet if the plaintiff had replevied, and defended himself against the distress, such charges would not have been incurred; and he might have replevied, and there was no evidence to shew that he had abandoned his intention of so doing. But it has been said, that the payments made by the plaintiff to the defendant must be considered as voluntary payments, and consequently that they cannot be recovered back in an action for money had and received. But I am of opinion, that, under the circumstances in which they were made, they cannot be treated as voluntary, but rather as compulsory payments. What are the facts? The defendant, a broker, was in possession of the plaintiff's goods, under a distress for rent due

from the latter to his landlord. I do not say that the broker was bound to remove them at once, or sell them within the time prescribed by law; but the plaintiff, being in pecuniary difficulties, and anxious that the goods should not be removed or sold, applied to the defendant for further time to be allowed him to procure his landlord the rent; on which the broker required the plaintiff to sign a request in writing not to sell, but to allow the man to remain in possession; which request the defendant required to be renewed from time to time; and the plaintiff thereby engaged to pay the charges of levying the distress, and keeping the man in possession. If the plaintiff had not paid those charges, it is evident that the defendant would have proceeded to a sale of the goods. The payments, therefore, were forced from the plaintiff, under an apprehension that his goods would be sold. It is impossible to say that payments made under such circumstances can be considered as voluntary payments; and, if they were not, the plaintiff was entitled to recover back whatever sums were improperly obtained by the defendant, and which exceed in amount the sum found by the Jury. Although it has been said, that this action, being for money had and received, cannot be maintained, on the authority of *Lindon v. Hooper*, yet, that case is altogether distinguishable, as it only decides, that an action for money had and received does not lie to recover back money paid for the release of cattle damage feasant, although the distress were wrongful;—on the grounds, that where the party has another and a better remedy, or can obtain a greater advantage by pursuing a different course, as by bringing an action of replevin, where the question would be raised on the record; or, if he do not choose to replevy, to make tender of amends, and then bring trespass for taking his cattle; yet here, neither replevin nor trespass could be maintained, as the goods were never removed from the premises; and Lord *Mansfield*, in that case, confined his observations to in-

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stances where a party might have a remedy in another form of action. In this case, the plaintiff's only remedy was, by an action for money had and received, by which he was entitled to recover back from the defendant, the payments which were made to him under duress (a), or an apprehension that his goods would be removed and sold, if the charges made by the defendant were not complied with and satisfied.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurred.

Mr. Justice GASELEE.—I considered, at the trial, that the broker was the agent of the landlord, and that, if the plaintiff had replevied, the defendant would have had no right to demand those charges. The expenses of keeping the man in possession, the Jury allowed, as being reasonable; but the defendant, acting as broker, must be considered as a public officer, and having a public duty to perform; and although he might grant an indulgence to the plaintiff, by postponing the sale of his goods, he had no right to insist on the payment of any charges he might think proper to make for such forbearance. He charged 2*l.* for drawing eight requests, which were similar to one another, with the exception of the dates; and as the goods were not removed from the premises or sold, the plaintiff's only remedy was by an action for money had and received.

Rule discharged.

(a) See *Astley v. Reynolds*, 2 Str. 915.

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GULLY and Others v. The Bishop of EXETER and
DOWLING.

Friday,
June 17th.

QUARE impedit. The declaration stated, that one *Richard Roberts*, on the 23d *May*, 1603, was seised of the advowson of the rectory and parish church of *Berryarber*, in the county of *Devon*, in gross by itself, as of fee and right; and that, being so seised, he, on the 23d *May*, 1609, presented one *William Herle*; that, on the 25th *December*, 1622, *Roberts* died so seised, and intestate; that the advowson descended and came to *Mary*, the wife of *Thomas Westcott*, *Jane*, the wife of *William Squire*, *Prudence*, the wife of *John Amory*, and *Grace*, the wife of *Francis Isaac*, as the daughters and co-heirs of the said *Richard Roberts*, deceased; that, whilst they were so seised, *viz.* on the 17th *January*, 1630, the church became vacant by the death of *Herle*; that the four co-parceners not agreeing jointly to present, it belonged to *Westcott* and *Mary* his wife, in right of the said *Mary*, as eldest daughter of *Roberts*, to present; and that, on the said 17th *January*, 1630, they presented one *George Westcott*; that the *first* turn descended to one *Richard Hill*, the son of *Mary Hill*, the daughter of *Mary Westcott*; that the *second* turn descended to *Christopher Squire*, the son of *Jane Squire*; that the *third* turn descended from *Prudence Amory* to *William*, her son, and from him to *Frances Gibbon* and *Prudence Barnes*, his daughters; and that the *fourth* turn descended to *Robert Isaac*, the son of *Grace Isaac*; that, on the 10th *July*, 1674, the church became vacant by the death of *George Westcott* (the first incumbent after the descent in co-parcenary); that, on the 11th *July*, 1674, *Grace Westcott* presented *Thomas Westcott*, lawfully, or usurping upon *Jane Squire*, it not being the *Westcotts'* turn to present; that, on the 10th *September*, 1674, the church became vacant

In *quare impedit*, the plaintiff, in his declaration, set out his title to an advowson, commencing in 1603, and which was principally founded on a deed of 1672. The defendants claimed under a subsequent deed, executed by the same party in 1692, and traversed every material allegation in the declaration in forty-three several pleas. The Court, after nonsuit and a rule absolute for a new trial, rescinded the original rule to plead several matters, and ordered twenty-two pleas to be struck out, and eventually confined the defendant to two only, which went to dispute the validity of the deed of 1672.

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by the death of *Thomas Westcott* (the second incumbent after the descent in co-parcenary); that, on the 24th *September*, 1674, one *Henry Gibbon* and *Frances* his wife, in right of the said *Frances*, presented *Henry Chichester*; that, on the 29th *April*, 1672, one *Robert Isaac*, by deed-poll, granted to *Lewis Stevings*, and his heirs, one fourth part or purparty of or in the advowson, in consideration of twenty shillings, and of true and faithful service, and for divers other considerations; that *Lewis Stevings* died seised of the purparty, leaving *John Stevings* and *Richard Stevings*, his sons, him surviving; that the purparty descended to *John Stevings*, as son and heir of *Lewis Stevings*, who thereupon became seised; that, on the 5th *January*, 1699, *John Stevings* granted the next avoidance to *Henry Chichester*, the incumbent, by indenture delivered to him, and, therefore, that it was not in the possession of the plaintiffs, but that they had the counter-part, which they were ready to produce; that, on the 1st *November*, 1714, the church became vacant by the death of *Henry Chichester* (the third incumbent after the descent in co-parcenary); that, on the 8th *November*, 1714, Sir *Nicholas Hooper* presented *Edward Chichester*, by usurpation on the representatives of *Henry Chichester*, the grantee of that avoidance; that, on the 1st *June*, 1719, *John Stevings* died, having by his will, dated the 10th *August*, 1705, devised the purparty to his brother *Richard*, if he should be living at the time of the testator's death, and, in case of the death of *Richard*, to his children, as tenants in common; that *Richard* died, leaving six daughters; and that they and their husbands, in right of their wives, became seised as tenants in common; that, on the 1st *September*, 1719, *John Bowen*, one of the husbands of the six daughters of *Richard Stevings*, died; and that, on the 20th *December*, 1719, the widow of *Bowen* and her five sisters and their husbands, by indenture, duly enrolled in the High Court of *Chancery*, granted the purparty to *Robert Incl-*

don and *Edward Fairchild*; that a fine was to be levied to the use of *Maunsell* and *Andrews*, two of the husbands of the daughters of *Stevings*,—and *Inclendon*, and *Fairchild*, in trust for sale, after suffering a recovery of other premises, and which recovery was duly suffered; that, in *Hilary Term*, 6 *Geo.* 1, a fine was duly levied between *Robert Inclendon* and *Edward Fairchild*, plaintiffs, and *Bowen*, widow, and others, deforciant; that *Fairchild* died seised, leaving *Maunsell*, *Andrews*, and *Inclendon* him surviving; that, on the 10th and 11th *November*, 1731, by deeds of lease and release of that date, the purparty was conveyed by *Maunsell*, *Andrews*, and *Inclendon*, to *John Davie*; that, on the 1st *January*, 1770, *John Davie* died, leaving *John*, his eldest, and *William*, his second son; and that, by his will of the 13th *June*, 1760, he devised the next turn to his son *William*; and that the reversion of the purparty descended to *John Davie*, as the eldest son and heir; that, on the 23d and 24th *April*, 1777, by deeds of lease and release of that date, *William Davie* granted his next turn to his elder brother, *John Davie*; that, on the 2d *January*, 1790, *John Davie* died seised, having, by his will of the 2d *September*, 1788, devised the purparty to *Joseph Davie*, his son; that, on the 5th *May*, 1731, the church became vacant by the death of *Edward Chichester*, and that *Richard Hill* presented *Robert Bluett* (being the second presentation in respect of the first turn, under *Mary Westcott*, the eldest coparcener); that, on the 27th *February*, 1749, the church became vacant by the death of *Robert Bluett*, and that *James Pearse* and *Mary* his wife, presented *John Seddon*, as in second turn, lawfully, or by usurpation upon persons entitled under *Jane Squire*, the second coparcener; that, on the 4th *February*, 1780, the church became vacant by the death of *John Seddon*; and that *Thomas Edwards* presented *Powell Edwards*, as in his turn, lawfully, or by usurpation upon persons entitled under *Prudence Amory*, the third copar-

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cener; that, on the 6th *July*, 1814, one *Joseph Davie* (now *Joseph Davie Bassett*), granted the next avoidance to *William Slade Gully*; that, on the 15th *March*, 1816, *Gully* made his will, and thereby devised the next avoidance to the plaintiffs, and appointed *Jenefer Gully*, *Anne Powne Gully*, *Samuel Thomas Gully*, and *Peter Thomas Gully*, his executrixes and executors; that *William Slade Gully* died on the 16th *November*, 1816; and that, on the 5th *April*, 1825, *Samuel Thomas Gully* proved his will, and assented to the bequest of the next presentation to the plaintiffs; that, on the 30th *October*, 1825, the church became vacant by the death of *Powell Edwards*, the last incumbent, being the first avoidance after the grant to *William Slade Gully*, and that such vacancy still exists; whereby it belonged, and now doth belong, to the plaintiffs to present a fit person thereto; but that the defendants will not permit them, but unjustly hinder them from so doing.

To this declaration, the defendants pleaded the following *forty-three* pleas, *viz.*—*First*, that the deed-poll of the 29th *April*, 1672, was not the deed of *Robert Isaac*;—*Second*, that he did not grant by deed-poll;—*Third*, that he did not grant for the considerations mentioned in the deed-poll;—*Fourth*, that the consideration of twenty shillings was not paid, nor service performed to *Isaac*, nor was the grant made *bond fide* for those and the other considerations mentioned in the deed;—*Fifth*, that *Isaac* was a lunatic, insane, and incapable of granting by deed-poll;—*Sixth*, that the deed-poll was made for the purpose of defrauding those who should purchase the purparty, and that *Isaac* conveyed the purparty by marriage settlement of the 4th *April*, 1692, (under which the defendant *Dowling* deduced his title);—*Seventh*, that *Lewis Stevings* did not die seised of the purparty, leaving his sons *John* and *Richard* him surviving;—*Eighth*, that the purparty did not descend to *John Stevings*, as son and heir, nor did he become

seised;—*Ninth*, that the grant of the next avoidance, by *John Stevings* to *Henry Chichester*, was not his deed;—*Tenth*, that the indenture delivered by *John Stevings* to *Henry Chichester* was not sealed;—*Eleventh*, that *John Stevings* did not grant by indenture to *Chichester*;—*Twelfth*, that *John Stevings* did not make a will;—*Thirteenth*, that he did not devise;—*Fourteenth*, that the six persons mentioned as the daughters of *Richard Stevings* were not children and the only children of *Richard Stevings*;—*Fifteenth*, that the six daughters of *Richard Stevings* were not married to their supposed husbands;—*Sixteenth*, that the six daughters and their husbands were never seised of the purparty;—*Seventeenth*, that there was no record of the fine of *Hilary Term*, 6 *Geo.* 1;—*Eighteenth*, that the fine was not declared to enure to the use of *Maunsell, Andrews, Incledon*, and *Fairchild*;—*Nineteenth*, that *Fairchild* did not die seised, leaving *Maunsell, Andrews*, and *Incledon* him surviving;—*Twentieth*, that the indentures of lease and release of the 10th and 11th *November*, 1731, were not the deeds of *Maunsell, Andrews*, and *Incledon*;—*Twenty-first*, that nothing passed by the said indentures;—*Twenty-second*, that *John Davie* did not make his will, in manner and form as in the declaration alleged;—*Twenty-third*, that he did not devise the next turn to his son *William*;—*Twenty-fourth*, that the purparty did not descend, nor any reversionary interest therein, to *John Davie*, the son;—*Twenty-fifth*, that the deeds of lease and release of the 23d and 24th *April*, 1777, were not the deeds of *William Davie*;—*Twenty-sixth*, that nothing passed by the said indentures;—*Twenty-seventh*, that *John Davie*, the son, did not die seised;—*Twenty-eighth*, that he did not make a will;—*Twenty-ninth*, that he did not devise;—*Thirtieth*, that the grant of the 6th *July*, 1814, was not the deed of *Joseph Davie*;—*Thirty-first*, that he, *Joseph Davie*, did not grant the next avoidance to *William Slade Gully*;—

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Thirty-second, that *William Slade Gully* did not make a will;—*Thirty-third*, that he did not devise;—*Thirty-fourth*, that he did not assent to the bequest before action brought;—*Thirty-fifth*, that neither *William Slade Gully*, nor any of his ancestors, nor any person under whom he claims, after the said *Robert Isaac*, were, or was seised of the purparty:—without this, that the plaintiffs became or were possessed of the next avoidance and right of presentation, on the death of *Powell Edwards*, in manner and form as in the declaration alleged;—*Thirty-sixth*, that the grant of the 20th *December*, 1719, was not the deed of *Bowen's* widow and her five sisters and their husbands;—*Thirty-seventh*, that they did not grant to *Inclendon* and *Fairchild* by that deed;—*Thirty-eighth*, that nothing passed by the said deed from *Bowen* and her five sisters and their husbands, to *Inclendon* and *Fairchild*;—*Thirty-ninth*, that there was no record of the recovery alleged in the declaration to have been suffered previously to the fine of 6 *Geo. 1*;—*Fortieth*, a special plea, in which the will of *John Davie*, of the 2d *September*, 1788, was set out, to which the plaintiff replied, and the defendants demurred to the replication;—*Forty-first*, that the purparty did not descend to *William Amory*, as son and heir of *Prudence Amory*;—*Forty-second*, that *Jenefer Gully*, *Anne Powne Gully*, *Samuel Thomas Gully*, and *Peter Thomas Gully*, never were executrices and executors of *William Slade Gully*;—and the *Forty-third*, or last plea, admitted the title of *Robert Isaac*, and set out the defendant's title under the marriage settlement of the 4th *April*, 1692, and traversed that the purparty was granted or passed by the deed-poll of *Robert Isaac*, in 1672, to *Lewis Stevings* and his heirs.

The declaration was delivered in *Hilary Term*, 1826, and, after several applications by the defendants for time to plead, thirty-five pleas were put in under a rule to plead several matters, in consequence of which, the plaintiffs amended the declaration twice, the last amendment having

been made in *Hilary* Term, 1827. The defendants, then, *viz.* on the 5th *February* in that Term, obtained leave to plead *de novo*, and put in eight additional pleas, but without obtaining a new rule to plead such several matters. The plaintiffs having obtained several orders for time to reply, they ultimately made up the issue and took the cause down to trial at *Exeter*, at the Spring Assizes, 1827, when, it being objected (among other things) that the will of *John Stevings* did not convey a fee in the purparty to the children of *Richard*, and that an advowson in gross would not pass under the word *tenement* in the will—Mr. Justice *Park* directed a nonsuit; which, in *Trinity* Term, 1827, the Court ordered to be set aside, and that a new trial should be granted.

Mr. Serjeant *Wilde*, in the same Term, *viz.* on the 30th *June*, obtained a rule *nisi* to discharge the rule to plead several matters, or that several of the pleas might be struck out or set aside, or that the declaration might be amended; and, on Mr. Serjeant *Edward Lawes*, being about to shew cause, it was consented, that the whole of the pleadings should be referred to Mr. Justice *Gaselee* at chambers, who was to re-form the record; and who ordered twenty-two pleas to be struck out, and altered seven of those that remained, but he gave either party leave to take the opinion of the Court, on giving the other six days notice for that purpose. The plaintiffs having given such notice, Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, again applied to strike out all the pleas, except those that related to the deed of 1672, as the merits of the cause depended entirely on that deed, which, if established, would altogether defeat the defendant's title; but, in consequence of the absence of Lord Chief Justice *Best*, from indisposition, the Court desired the case to stand over to the last *Hilary* Term, when Mr. Serjeant *Wilde* again obtained a rule *nisi*, either to rescind the original rule for pleading sever-

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al matters, or to amend the declaration by adding a count, stating that the daughters of *Richard Stevings* took by descent instead of devise, they being the co-heiresses of *John Stevings*, as well as devisees;—or as the Court should order or direct: and with respect to the pleas, the Learned Serjeant submitted, that, as the plaintiffs and the defendant *Dowling* both claimed under *Robert Isaac*, viz. the one under a deed of 1672, and the other under the settlement of 1692, if the former deed were established, the defendant could not have a writ to the bishop. At all events, the defendants ought to have obtained a new rule to plead several matters when they put in the eight additional pleas, and more particularly so, as they were not applicable to the last amendment made by the plaintiffs in their declaration.

Mr. Serjeant *Edward Lawes*, shewed cause in the course of the same Term.—The last rule which the plaintiffs obtained, has two objects in view, the one to amend the declaration by adding a count, which cannot be done in *Quare Impedit*, nor had the Court any authority to set aside the nonsuit and order a new trial, as the moment the plaintiffs were nonsuited, the defendant *Dowling* had a right to require a writ from the bishop, and under which he ought to have been put into possession. The plaintiffs could only state one title in their writ, and if they claimed under two different ancestors one seisin would be sufficient. In *Buckmere's* case (a), it was decided that in all real actions founded upon a title, the demandant cannot join lands, accruing by two several tenures, or by two several gifts, in the same writ; and, in *Comyns's Digest* (b), it is said that a man cannot join several and distinct causes of action in the same count or declaration. In

(a) 8 Rep. 87 b.

(b) Tit. "Action" (G).

Brooke's Abridgment (a), in detinue of charters, the plaintiff counted of a bailment made by his father to re-bail to him or his heirs, and shewed how the land was given by his ancestor, whose heir he was in tail, and that the reversion reverted to him, as heir, by the death of the tenant in tail without issue;—and the bailment to re-bail to him or his heirs, and the title to the land, by which he relinquished the descent of the reversion, were held to be double. Here, the claim by descent is altogether different from a claim under a devise, and both cannot be introduced into the declaration. If the defendant was entitled to judgment on any one plea, it would have the effect of destroying the plaintiffs' title, and the defendant in such case might claim a writ to the bishop. Although in *Fitzherbert's Natura Brevium* (b), it is said, that where the writ abates for form or false *Latin*, the defendant shall not have a writ to the bishop; yet a writ went to the bishop, on a title made for the defendant, where the writ abated. 11 *Hen.* 6, 53.—31 *Hen.* 6, 25.—In *Comyns's Digest*, it is said (c), that, if the plaintiff is nonsuited, it is peremptory, and the defendant shall have a writ to the bishop, and that, after a verdict before Justices of Assize, by the statutes *Westminster* 2d, 30; 12 *Edw.* 2, 4; and 14 *Edw.* 3, c. 16, the Justices may give judgment immediately, and award a writ to the bishop; and, although it is stated (d), that, if the plaintiff is nonsuited, the defendant shall not have a writ to the bishop before title made, (and *Fitzherbert's Natura Brevium*, 38, K. and *Rastell's Entries, Qu. Imp. Evesq.* 2, are cited in support of that position,) yet here the defendant's title was pleaded, and appeared on the face of the record, at the first trial. In *Tufton v. Temple*, it is said (e), that, “in a *Quare Impedit*, both plaintiff and defendant may be actors, and either may have a writ to the bishop, as the

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EXETER.(a) Tit. *Double Plea*, 7.

(b) 90 H.

(c) Tit. *Pleader*, 3 I. 11.(d) Com. Dig. tit. *Plender*, 3 I.

12.

(e) *Vaughan*, 7, 8.

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right falls out to be; but that the plaintiff who is to recover that which he hath not, must shew a good title before he can recover, or he shall never avoid the defendant's possession, by shewing no title, or an insufficient title, which is the same as none. The plaintiff must recover, if at all, by his own strength, and not by the defendant's weakness, as is well urged and cleared in *Digbie's* and *Fitzherbert's* case (a)". The defendant, therefore, was not bound to disclose the whole of his title, and it was impossible for him to have any knowledge of the contents of the plaintiffs' deeds referred to in the declaration. Neither of the pleas are unnecessary or superfluous, as it was incumbent on the defendant to traverse every material allegation in the declaration. In *Brooke's Abridgment* (b), in *Quare Impedit*, it was said by *Kirton*, and not denied, "that a privy to a deed which is pleaded shall say *non est factum*, but not a stranger; but he shall say, that the plaintiff did not grant by the deed, or did not release by the deed, or did not enfeoff by the deed, or did not charge by the deed, and the like." Again (c), "a stranger to a deed, shall not say *non est factum*, but that he did not give by the deed, or that nothing passed by the deed." Although in *Taylor v. Needham*, Sir *James Mansfield* said (d), "It is truly stated for the defendant, that, in cases of a grant or feoffment, a stranger may plead, 'did not grant, or did not enfeoff,' and that plea denies not only the existence, but the efficacy of the supposed grant or feoffment. It brings in issue, therefore, the title of the grantor, as well as the operation of the deed; and that plea would be a proper plea, to bring in issue the execution, construction, and efficacy of any deed of demise;" yet, in Lord Chief Baron *Gilbert's* *Treatise on the action of debt*, it is said (e)—"If a man plead *rien passe per le fait*, as in the case of enrolment, he can never give in evidence, that the deed was never sealed

(a) Hobart, 101,

(d) 2 Taunt. 282.

(b) Tit. *Estraunger al fait*, pl. 4.

(e) Page 437.

(c) Id. pl. 6.

and delivered." It was, therefore, incumbent on the defendant to plead several pleas to the deeds of 1672, 1699, 1719, 1731, and 1777, and all the pleas raise issues on distinct allegations in the declaration, which the defendant had the privilege of disputing. In *Trickey v. Yeandall* (a), where the defendant pleaded several special pleas in trespass; as they involved questions of distinct and separate rights, the Court refused to refer it to the Prothonotary to determine whether any of such pleas should be struck out as being unnecessary or irrelevant. So, in *Bennett v. Brindley* (b), where a declaration contained eight counts on an attorney's bill, the Court refused to strike out either of them, Mr. Justice Burrough observing, that the motion was more vexatious than the declaration. In *Thomas v. Jackson* (c), a declaration for slander contained thirty-three counts, several of which set out words not actionable, and some varied in a very trifling degree from the others, and, the defendant having had a rule to plead *de novo*, it was held that he could not afterwards apply to strike out some of the counts, as being superfluous. Here, if the defendant had demanded oyer of all the deeds referred to in the declaration, the Court could not have refused it; and it is impossible for them to judge what pleas might be necessary, until after the cause is tried; and, although it has been said that the defendant ought to have obtained a new rule to plead when the eight pleas were added, yet in *Bartholomew v. Ireland* (d), where in trespass the defendant pleaded several pleas, without saying 'by leave of the Court,' it was held to be a mere irregularity, and could only be taken advantage of by motion, and not as error; and the principle of that case was confirmed in *Ryley v. Parkhurst* (e). In *Lord Clinton v. Morton* (f), the defend-

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(a) 7 B. Moore, 351. S. C. 1
Bing. 66.

(b) 9 B. Moore, 358; S. C. no-
mine, *Brindley v. Dennett*, 2 Bing.
184.

(c) 10 B. Moore, 152.

(d) *Andrews*, 108.

(e) 1 Wils. 219.

(f) 2 Str. 1000.

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ant had leave to plead his bankruptcy generally and specially; and in *Ward v. The Charitable Corporation* (a), the Court allowed a party to plead several statutes; and Mr. Justice *Probyn* said, "the question is, whether, as they think this will be a good plea for their clients, we can hinder them from pleading it." In *Wilkins v. Perry* (b), the Court refused to strike out a count in a declaration, after time to plead; and here, as the defendants gave a rule to reply before the motion to rescind the rule for pleading several matters was made, the application was at all events too late, particularly as the plaintiffs had not only amended their declaration twice, but had gone down to trial without raising any objection to the additional pleas.

Mr. Serjeant *Wilde*, in support of his rule, was stopped—

By the Court, who said, that, after they had looked into all the authorities, they were clearly of opinion that that part of the rule to amend the declaration, and to rescind the original rule for pleading several matters, must be made absolute; that it was doubtful whether there could be two counts in *Quare Impedit*, although there was a second count, differing in terms from the first, in *Fox v. The Bishop of Chester* (c); that in *Tufton v. Temple* there was a most elaborate argument, where, although it was admitted that, in *Quare Impedit*, both the plaintiff and defendant may be actors, yet that it does not always follow: there too the plaintiff's title was deduced in one count, in which several presentations and several titles to present, were set out.

With respect to the rule to plead several matters, the Court observed that they were not furnished with the

(a) Cas. temp. Hardw. 126.

(b) Id. 129.

(c) 2 Barn. & Cress. 636.

nature or number of the pleas at the time of the application; if they had been, several of them would not have been allowed, which is manifest from twenty-two of them having been afterwards thought unnecessary, and ordered to be struck out.

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Rule absolute.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule *nisi* to amend the declaration, by striking out the allegations as to the descent of the first, second, and third turns, the plaintiffs relying on the descent of the fourth turn to *Robert Isaac*; and also by stating, that *Joseph Davie*, now *Joseph Davie Bassett*, through whom the plaintiffs claimed, took by descent, and not under the devise of his brother, *John Davie*; and, after cause shewn by Mr. Serjeant *E. Lawes*, the rule was made absolute, the defendant being at liberty to plead *de novo*.

Mr. Serjeant *E. Lawes*, on a former day in this Term, obtained a rule *nisi* to plead the several matters following, *viz.*—*First*, that the deed of *Robert Isaac*, of the 29th April, 1672, was fraudulent and void as against subsequent purchasers;—*Second*, that *Isaac* did not grant by that deed;—*Third*, that the purparty did not descend to *John Stevings* as son and heir of *Lewis Stevings*;—*Fourth*, that *John Stevings* did not grant the next avoidance to *Henry Chichester*, by the indenture of the 5th January, 1699;—*Fifth*, that *John Stevings* did not make a will, or devise the purparty to his brother *Richard* and his children;—*Sixth*, that *Bowen's* widow and her five sisters, and their husbands, did not grant to *Inclendon* and *Fairchild* by the deed of the 20th December, 1719;—*Seventh*, *nul tiel record* of the fine of Hilary Term, 6 Geo. 1;—*Eighth*, that it was not levied to the uses stated;—*Ninth*, *nul tiel record* of the recovery suffered in Hilary Term, 6 Geo. 1;—*Tenth*, that nothing passed

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by the indentures of lease and release of the 10th and 11th *November*, 1731;—*Eleventh*, that *John Davie* did not make his will, or devise the next turn to his son *William*;—*Twelfth*, that nothing passed by the indentures of lease and release of the 23d and 24th *April*, 1777;—*Thirteenth*, that *John Davie* did not devise the purparty to *Joseph*, his son;—*Fourteenth*, that *Joseph Davie* did not grant the next avoidance to *William Slade Gully*, by the deed of the 6th *July*, 1814;—*Fifteenth*, that *William Slade Gully* did not devise to the plaintiffs;—and the *sixteenth*, or last plea, set out the defendant's title under *Robert Isaac's* deed of settlement of the 4th *April*, 1692.

Mr. Serjeant *Wilde* now shewed cause.—As the plaintiffs and the defendant *Dowling* both claim title under *Robert Isaac*, the one under the indenture of 1672, and the other under the deed of settlement of 1692, if the former deed be established, it will have the effect of defeating the defendant's title altogether. All the pleas, therefore, except those that relate to the deed of 1672, which is the only point in issue between the parties, ought to be struck out, as they are beside the merits of the cause, and only tend to useless prolixity and unnecessary expense. The defendant has, in fact, traversed every allegation in the declaration, and also set out his own title, which rests entirely on the deed of 1692. The question, therefore, arises solely on the validity of the deeds of 1672 and 1692, to which the pleas ought to be confined.

Mr. Serjeant *E. Lawes*, in support of his rule.—It is absolutely necessary to constitute a good defence, that all the pleas which are now applied for should stand, as each of them takes issue on a material allegation in the plaintiff's declaration, and which he is bound to substantiate in order to support his title. If several facts be so connected as to form one uniform title, the adverse

party is not to be confined to the mere traverse of one fact; and here, it was incumbent on the plaintiffs to prove their title strictly, and *in omnibus*. The Court need not resort to the statute of *Anne*, as a defendant has always been admitted to take issue on every matter of fact brought forward by the plaintiff; and, although the plaintiff confines himself to one point in the declaration, yet the defendant may plead several pleas in answer to that point. Here, however, the plaintiffs rely on two facts, which are severally alleged in the declaration, *viz.*—*First*, their own title;—and *Secondly*, the disturbance by the defendants; and as the plaintiffs' title must be complete, in order to entitle them to recover, it follows that it must be constituted or made up of a variety of facts and different documents, the truth or validity of which the defendants are entitled to dispute. In *Rowles*, demandant; *Lusty*, tenant (*a*), which was a writ of entry *sur abatement*, the demandant, by his count, demanded six messuages, six mills, &c., and the tenant pleaded that *R. S.*, being seised of the messuages, &c., devised them to *R. T.*, in fee, who afterwards devised them to *S.*, the wife of *R. D. C.*, in fee, and that he, in right of his wife, levied a fine to the tenant; and on special demurrer, assigning that the plea was double, for alleging the devise by *R. S.* to *R. T.*, and by him to *S.*, the wife of *R. D. C.*, and also the fine levied by *R. D. C.* and his wife; either being a sufficient answer—the Court having taken time to consider—Mr. Justice *Park*, in delivering the judgment, said (*b*); “No matters, however multifarious, will operate to make a pleading double, provided that all taken together constitute but one connected proposition or entire point.” The true rule in pleading is this, that duplicity is, where two distinct matters, not being part of one entire defence, are attempted to be put in issue. But this can never apply to, nor does it ever preclude, a person from introduc-

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(a) 1 Moore & Payne, 102.

(b) *Id.* 123.

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ing several matters into a plea, if they be constituent parts of the same defence. For, though it be true that issue must be taken on a single point, yet, it is not necessary, nor ever can be, that such single point must consist only of *one single fact*. This is well illustrated by the case of *Robinson v. Rayley* (a), where, to an action of trespass, the defendant had, amongst other things, pleaded a right of common; and the plaintiff, in his replication, traversed that the cattle were the defendant's own cattle, that they were *levant* and *couchant*, and that they were *commonable* cattle; to this there was a special demurrer, that the replication was multifarious, and that several matters (specifying them) were put in issue, whereas one single matter ought to have been so. Lord *Mansfield* said: "It is true, you must take issue upon a *single point*; but it is not necessary that this *single point* should consist *only* of a *single fact*—here, the point is, the cattle being entitled to common. This is the single point of the defence. But, in fact, they must be both his *own* cattle, and *also lewant* and *couchant*; which are two different essential circumstances of their being entitled to common, and *both* of them absolutely requisite." So, here, the plaintiffs' title consisted of a variety of facts, all of which it was incumbent on them to prove to make it complete; and if they failed in one material link, the defendant could not be disturbed: and it would open a wide door to fraud if he should not be permitted to canvass and hold the plaintiffs to the strictest proof of their title. They could not call on the defendant to shew his title until they had fully and satisfactorily established their own. A *Quare Impedit* may be compared to an indictment or other criminal proceeding, where the prosecutor is put to the strictest proof, in order that justice may be done to the party accused. It is incumbent on a party who makes a charge to substantiate it

(a) 1 Burr. 316.

in every respect; and, therefore, the plaintiffs were bound to set forth their title fully in the declaration; and, although the issue must eventually be taken upon a single point, it need not be confined to the traverse of a single fact. At all events, the Court have a discretion as to what pleas the defendant *Dowling* may be entitled to, or what may be necessary for his defence.

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Lord Chief Justice BEST.—I am very glad that this question has been fully brought before the Court; for, although it embraces a mere matter of practice, yet it raises a point of the greatest importance; as on our decision it will depend whether suits shall be carried on at an enormous and unnecessary expense, or whether, when several questions are raised on the face of a record, the real object of special pleading shall be attained by reducing them to the single point or issue to be tried, so as to arrive at the real justice and merits of the case. At common law, a defendant was only permitted to plead one plea to the whole count; and a count and declaration may be considered synonymous in this respect; for, although a plaintiff may subdivide his causes of action so as to meet the particular circumstances of the case, and the evidence in support of them; yet they all tend to the same end, and form parts of one and the same complaint. It was also a principle at common law, that all pleadings ought to be true, but that has long since been lost sight of, and can rarely, if ever, be the case, where several pleas are pleaded. But, as the rigour of confining a defendant to plead a single matter frequently abridged the justice of his defence; on the difficulty being presented to the Legislature, the statute 4 *Anne*, c. 16, was passed for the amendment of the law, by which a party is allowed to plead as many several matters to an action or suit as he shall think necessary for his defence, but *with the leave of the Court* in which the action is brought. It is, therefore, in the discretion of the

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Court to allow such pleas only as they may deem necessary or essential to the justice of the case, and not to burthen a record with unnecessary pleadings or matters of prolixity and chicanery. We have considered this case very fully, and have enough of the merits before us to see what justice requires. It appears that the living in question was conveyed under a deed of 1672, and on that conveyance the plaintiffs rest their claim. The defendant *Dowling* does not pretend to derive any title under it, but founds his claim on a deed of 1692. If, therefore, the deed of 1672 be a valid deed, and conveyed a right to the living, the defendant's claim is gone, and he can have no interest in the property. The justice of the case, therefore, requires the pleas to be confined to those which tend to invalidate that deed; and, should the defendant succeed in so doing, the plaintiffs would be out of Court. But the defendant not only insists upon taking issue on documents long subsequent to that deed, but even after the deed of 1692, on which alone he relies; and if his right accrues from or depends on that deed, the subsequent instruments cannot affect him. But it has been said, not only that the defendant has a right to dispute the validity of the plaintiffs' claim, but that, if one link of their title fails, it would be destructive of their right. But the object of pleading would be defeated, if the defendant were to put it on the plaintiff to trace his whole title, according to the statement on the record. In the action of ejectment there are no special pleas, and yet the plaintiff is required to shew that the legal title is vested in him, and that is sufficient. The main object of pleading is to reduce the matters in dispute to a short and single point; and a defendant ought not to be allowed to break in upon the different parts of a plaintiff's title, and traverse every distinct averment of facts which are wholly immaterial to the merits of the cause; or put the plaintiff to prove every successive link of his title. He is thereby not only put to the expense of the pleadings,

but also of the witnesses he must have in attendance at the trial to prove these facts. Here, the defendant ought to break in upon the line of the plaintiffs' title but once, *viz.* to dispute the validity of the deed of 1672. It is incumbent on the plaintiffs to shew some conveyance to the persons under whom they claim; and, therefore, the defendant may not only plead that the deed of 1672 was fraudulent and void as against subsequent purchasers, but also *non concessit* as to that deed; but he shall only dispute the validity of that instrument, and not put the plaintiffs to the enormous expense of proving their whole title. An allusion has been made to criminal proceedings; but there is a wide distinction between criminal law and the administration of civil justice. Humanity forbids a prisoner from giving evidence that may criminate himself; and it is incumbent on the prosecutor to prove his case in every particular; but that does not apply to civil proceedings. Here, it is an act of humanity to put the litigant parties to as little expense as possible; and, although we may not now be able to go back to the early part of our law, or return to the ancient and simple mode of pleading, yet we must approach it as nearly as possible; and I have long since thought, that it is the duty of the Court to look with a strict eye to the nature of the several pleas, when the rule to plead is applied for (a), in order to the advancement of the due administration of justice, and to prevent unnecessary expense and delay to the parties. I am, therefore, of opinion, that the defendant must be confined to the two first pleas by which he seeks to impeach the deed of 1672.

Mr. Justice PARK.—As in all probability I shall have to try this cause at the next Assizes at *Exeter*, it is sufficient for me to say that I perfectly concur with my Lord Chief Justice.

(a) See *Smith v. Backwell*, 1 Moore & Payne, 388.

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Mr. Justice BURROUGH.—I am most happy, that an opportunity is now afforded me of expressing my opinion on this point. The practice of pleading several matters has been long abused, and I have not only always discountenanced it, but think that it must be now restrained. Here, if the deed of 1672, be defeated, all the other issues fall to the ground; and the verdict of the Jury will depend entirely on the validity or invalidity of that instrument. Although the Court cannot repeal the statute of *Anne*, yet they have a discretion expressly vested in them as to what pleas may be deemed proper to be placed on the record; and although we are not to decide the cause, yet we ought to see that it goes down to trial on its merits. If there be any objection to the pleadings in point of form, we may remedy it, or re-model them. Here, the justice of the case is, to confine the defendant to the main question in issue, *viz.* the validity of the deed of 1672, and not allow him to trip up the plaintiffs on a subordinate or trifling point; but the pleas we are now desired to place on the record are altogether unconnected with the defendant's claim, which rests solely on the deed of 1692. Before the statute 82 *Geo.* 3, c. 58, was passed, a defendant could not plead double in an information in nature of *quo warranto*. But it has been said, that, in this case, all the issues form but one defence, and that, although the defendant traverses several allegations in the declaration, yet that they tend to one single point; and we have been referred to the case of *Robinson v. Rayley*; but there the replication traversed one entire fact, and was, in effect, one allegation or proposition; for, in order to shew that cattle were entitled to common, they must, *ex necessitate*, be shewn to have been the cattle of the party, and also *levant* and *couchant*; and here, if all the issues formed but one point of defence, they might have been introduced in one plea.

Mr. Justice GASELEE.—If those who framed the statute

of *Anne* could have contemplated what abuse would be made of it, that statute would never have been passed. Although it lays down no general rule, yet it has given a defendant a great advantage over a plaintiff, which is sufficiently apparent on the face of this record. The plea in which the defendant has set out his own title, contains nearly as many facts as are alleged by the plaintiffs in their declaration; and yet, by the rules of the common law, and before the passing of the statute of *Anne*, although a defendant might have several substantial grounds of defence to an action or suit, he could only plead one matter, to which the plaintiff might reply, and on which alone the issue was taken. But we ought not to give too great effect to that statute. It has given us a discretion as to what matters we may think necessary for a defence; for a defendant cannot plead several matters, without the leave of the Court, who will apportion them according to the justice of the case. Here, the pleas, so far from meeting the justice of the case, only tend to throw impediments in the plaintiffs' way; for the only substantial ground of defence is the invalidity of the deed of 1672; and that, as it was fraudulent and void against subsequent purchasers, the deed of 1692 is the only legal instrument. But the defendant is not bound to call in aid any other deeds or documents to extract that simple fact, or to throw light on the former deed. He may produce them in evidence if they shall be deemed necessary to invalidate that deed. He may either demand oyer, or make an application for inspection or copies; and the fine or recovery may be called for at the trial, without the assistance of the Court or the leave of the plaintiffs. The defendant is not to set up for himself any defence which he may think proper; and we ought to be particularly cautious; for, if the plaintiffs be tripped up, the defendant might apply to the bishop for a writ, and yet his title under the deed of 1692, might be a mere fabrication. But it is unnecessary for us now to

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say, whether he would be entitled to such writ or not. There are conflicting authorities on that point; for, although the defendant's title need not be investigated at the trial, if he prove the plaintiffs' to be unfounded, yet he must shew his own title, before the bishop is bound to grant the writ. But it has been said, that, as the plaintiffs have brought the defendant into Court, it is incumbent on them to shew the whole of their title, and that the defendant may attack any part of it he pleases. But this is not like a common action; for the defendant has never been in possession, and it is he in fact who has brought the plaintiffs into Court, by entering a *caveat* with the bishop. It has also been said, that, if a defendant confine himself to one point in the plaintiff's case, he may use several pleas to meet that point; and we have been referred to the case of *Rowles v. Lusty*, as establishing that principle. But that case appears to me to have no application to the present, as there the party did not affect to set up more than one plea, in which he set out his title;—and the devise and fine formed but one assurance. The true principle, in pleading several matters, is, that, if the Court can see that justice requires that a party should plead several matters, or allege several defences under the statute of *Anne*, they will not prevent it; but if, on the other hand, several grounds of defence will tend to oppress or harass the plaintiff, the Court will not allow them to be put on the record. With respect to the issues raised on the wills, they are altogether beside the present question; and although the intermediate title between the years 1672 and 1692 might, perhaps, be let in, yet as the only question depends on the validity of the first deed, the defendant ought to be confined to that point alone. The rule therefore must be made absolute as to the first and second pleas, and discharged as to all the others.

Rule accordingly.

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CHOLMELEY, Esq., Demandant; Sir WILLIAM PAXTON,
Knight, and two Others, Tenants.

Tuesday,
June 17th.

THIS was a writ of *formetion*. The demandant claimed the manor of *White Knights*, and other lands in the county of *Berks*, under the will of Sir *Henry Englefield*, Bart. The count set out so much of the will as showed that the estate was devised by him to Lord *Cadogan*, and Sir *Charles Bucke*, and their heirs, in trust for *Henry Charles*, the eldest son of Sir *Henry Englefield*, for life, without impeachment of waste; remainder to the first and other sons of the said *Henry Charles*, in tail male; remainder to *Francis Michael*, the second son of the deviser, for life, without impeachment of waste; remainder to the first and other sons of the said *Francis Michael*, in succession, in tail male; remainder to the deviser's daughter *Theresa Ann* (the mother of the demandant), for life, without impeachment of waste; remainder to her first and other sons in succession, in tail male.—The count then stated the death of the deviser and his widow, who had an estate for life; the death of his son *Henry Charles*, and of *Francis Michael*, without issue; that his daughter, *Theresa Ann*, married one *Francis Cholmeley*, by whom she had issue the present demandant, who, upon her death, claimed the estate, and commenced this suit, as her heir-at-law. The tenants, after traversing the devise by Sir *Henry Englefield*—his death—the marriage of his daughter 'with the father of the demandant—that *Francis Michael*, the second son of the deviser, died without issue—that the demandant was the eldest son of the deviser's daughter, by *Cholmeley*—that *Henry Charles*, the eldest son of the deviser, died without issue—and that he was seised of the manor, on the

An estate was devised to trustees, with power from time to time, at the request and by the direction and appointment of the tenant for life, signified by deed or writing under his hand and seal, attested by two or more witnesses, to sell the lands devised, and that, when they should be sold, in pursuance of the power given by the will, the money arising from the sale should be laid out by the trustees and invested in the purchase of other lands; and, until such investment, should be placed out on real or government securities, with the consent of the tenant for life, testified as aforesaid. Part of the estate was sold, and the proceeds of the sale invested in the funds, without any consent by deed of the tenant for life; and the issue was, whether the money had been invested with such

consent, according to the directions of the will:—*Held*, that it was properly left to the Jury, to say whether the money had been invested with the consent of the tenant for life, by deed attested; and they having found in the negative, the Court refused to disturb the verdict.

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death of his father—pleaded, *ninthly* (a), after admitting the seisin and will of Sir *Henry Englefield*, that he thereby declared his will to be, that, notwithstanding any of the uses thereinbefore created and limited, it should be lawful for the trustees or the survivor of them, from time to time during the lives of *Henry Charles*, *Francis Michael*, and *Teresa Ann Englefield*, or any or either of them, at the request, and by the direction and appointment of the person who, for the time being, should be in possession of or entitled to the rents and profits of the manor and lands thereby devised, *signified by any deed or writing under his or her hand and seal*, attested by two or more witnesses, to make sale and dispose of, or to convey in exchange for other manors and lands, all or any part of the manor and lands devised to any person, either together or in parcels, for such price or prices in money as to the trustees should seem just and reasonable; and, for the purpose of such sale, to revoke the uses expressed in the will, and to declare other uses; that the testator further declared his will to be, that, when any of the premises devised should be sold for a valuable consideration in money, *in pursuance of the powers given by the will*, all and every the sum and sums which should arise by such sale or sales should be laid out and be disposed of by the trustees, or the survivor of them, *with the consent of the tenant for life*, and be invested in the purchase of freehold lands of as good value in the judgment of the trustees as the lands by the devise made saleable; and that, until the money arising by such sale or sales should be invested in purchases in the manner in the will before directed, the same should be placed out on real or government securities, at interest, by the trustees, *with the consent of the tenant for life, testified as aforesaid*; and the interest of the money so to be

(a) See the eighth plea, which judgment was given for the demandant, 1 Moore & Payne, 17.

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invested, should be paid to such persons, and applied to the same uses, as the rents and profits of the lands so to be purchased would go and be payable, in case such purchases were then made. The plea then stated the death of Sir *Henry Englefield*, the testator, on the 1st *June*, 1780, whereupon Lord *Cadogan* and Sir *Charles Bucke* became invested with the trusts and powers &c.; and that *Henry Charles Englefield*, the eldest son, entered upon the premises devised, and was seised for life; that, on the 12th *May*, 1783, in pursuance of the powers &c., Lord *Cadogan*, after the decease of Sir *Charles Bucke*, at the request of Sir *Henry Charles Englefield*, the first tenant for life, sold the manor in question (part of the lands devised,) to *William Byam Martin* (under whom the tenants claimed), for 13,400*l.*, a sum which Lord *Cadogan* judged to be a reasonable price for the same; and that, by the same indenture, the said Sir *Henry Charles Englefield* sold to *Martin* all the timber and trees then standing or growing on the lands thereby granted, for the sum of 2,448*l.* The tenants then averred, that, after the making of the said indenture, and after the payment of the said sums of 13,400*l.* and 2,448*l.* therein mentioned, as well the said sum of 13,400*l.*, as the said sum of 2,448*l.*, were, with the consent of the said Sir *Henry Charles Englefield*, placed at interest, that is to say, the sum of 12,000*l.* on real security, and the residue thereof in government securities, to wit, 3 *per cent.* consols, by and in the name of Lord *Cadogan* (who had so survived the said Sir *Charles Bucke*), for the purposes and on the trusts in the said will mentioned.

To this plea, the demandant, after craving *oyer* of the indenture of *May*, 1783, which was set out *verbatim*, replied—that the said several sums of 13,400*l.*, and 2,448*l.*, in the plea specified, were not placed at interest on real and government securities, by and in the name of Lord *Cadogan*, according to the directions of the will

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of the said Sir *Henry Englefield*, for the purposes and on the trusts therein mentioned; on which issue was joined, as well as on the other pleas traversing the will and descent, &c.

At the trial, before Mr. Justice *Littledale*, at the last Summer Assizes for *Berkshire*, the tenants, in support of their ninth plea, proved, as to the above sum of 13,400*l.*, that Lord *Cadogan* had, in 1783, lent 12,000*l.* upon mortgage, and invested the remaining 1,400*l.* in the purchase of three *per cent* consols, in his own name; that the mortgage was paid off in 1789, and that, in *August* in that year, Lord *Cadogan* lent 12,500*l.* on another mortgage, viz. the above sum of 12,000*l.*, and 500*l.* by sale of consols; that the latter mortgage was paid off in 1791, and that, in 1806, the solicitor of Sir *Henry Charles Englefield*, having, in the course of a conversation with the latter, discovered that he (Sir *Henry*) had received the 2,448*l.* for the timber left standing on the estate, told him that as it was not cut down, he had no right to receive the money, but that the same ought to have been paid to Lord *Cadogan*, and held by him on the same trusts as the 13,400*l.* were held; that Sir *Henry* then said he would rectify the error, and, in *July*, 1806, transferred to the account of Lord *Cadogan*, 3,681*l.* 4*s.*, three *per cent.* Consolidated Bank Annuities, being the amount of stock which the said 2,448*l.* would have purchased at the time the same was paid to Sir *Henry Charles Englefield*; and the draft of a deed of declaration of trust thereof was prepared by his solicitor and left for the approbation of the solicitor of Lord *Cadogan*. Before this draft was engrossed, Lord *Cadogan* died, and consequently no declaration of trust was ever executed, nor was the stock accepted by him, but the whole of the money was duly applied under the trusts of the will of Sir *Henry Englefield*. On the 13th *July*, 1819, by an Act of Parliament, intituled, “An act for appointing new trustees for carrying into execution the trusts

and powers contained in the will of the late Sir *Henry Englefield, Bart.*," and to which the demandant was a consenting party, after reciting (among other things) the loan of 12,500*l.*, upon mortgage, and that the residue of the trust monies arising from the sales consisted of 4,282*l.* 14*s.* 9*d.* three *per cent.* Consolidated Bank Annuities, then standing in the name of Lord *Cadogan*, in the Bank books—the death of Lord *Cadogan*, in 1807, having by his will, appointed Lord *Orford*, *Hans Sloane*, and *Joseph White*, executors—a commission of lunacy, dated the 30th October, 48 Geo. 3, against *Charles Henry*, Earl of *Cadogan*, the son—and that Lord *Orford*, and *Hans Sloane*, were appointed committees of his person and estates—that *Francis Cholmeley*, the son (the present demandant), had attained the age of twenty-one years, and, under the will of the said Sir *Henry Englefield*, was the first tenant in tail of the manors &c. thereby devised—that Sir *Henry Charles Englefield* and *Francis Cholmeley* were desirous that the estates, trusts, and powers, given by the testator's will, which became vested in *Charles Henry*, Earl of *Cadogan*, on the decease of the said *Charles Lord Cadogan*, should be vested in new trustees—It was enacted, that all and singular the manors &c. (except such of them as had been sold) should be vested in *William Cruise*, and *Edward Jerningham*, Esquires, their heirs and assigns, and that the said Lord *Orford* and *Hans Sloane* should immediately assign to the said *Cruise* and *Jerningham* the said sum of 12,500*l.*, secured upon mortgage, and all the messuages &c. comprised therein, and also transfer to the said *Cruise* and *Jerningham* the said sum of 4,282*l.* 14*s.* 9*d.* three *per cent.* Consolidated Bank Annuities, to the uses and upon the trusts &c., under the testator's will &c.

The learned Judge left it to the Jury to say whether the several sums of 13,400*l.*, and 2,448*l.*, were, with the consent of Sir *Henry Charles Englefield*, the tenant for life, placed at interest, or invested in real property, accord-

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ing to the directions of the will, for the purposes and on the trusts in the will mentioned; and he said, that the will directed, that when property was sold, the money was to be invested, not only with the consent of the tenant for life, but that such consent must be given by deed, attested by two witnesses, which did not appear to have been complied with, and therefore that the tenants had not proved their allegation as to the investment of the 13,400*l.*;—that, with respect to the other sum of 2,448*l.*, as the timber was not sold by the trustee, but by the tenant for life, and the trustee was not made a consenting party to the sale, it was not sold pursuant to the directions of the will; he therefore told the Jury that the tenants had not established the allegation in their ninth plea.

The Jury accordingly found a verdict for the demandant on all the issues, and expressly that the sum of 2,448*l.* was not invested under the directions of the will.

Mr. Serjeant *Peake*, in the last *Michaelmas* Term, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted, or that a verdict might be entered for the tenants on the ninth plea, on the grounds, *first*, that the allegations in that plea were supported by the evidence, as it was proved that Sir *Henry Charles Englefield*, the first tenant for life, had consented to the sale to *Martin*, and also that the sums in question should be invested in Government securities, in the name of Lord *Cadogan*, and which his Lordship accordingly did; and when that was done, he must be taken to have acted in pursuance of and under the will of Sir *Henry Englefield*:—if a consent by deed were necessary, the demandant should have demurred; and, *secondly*, that there had been a misdirection by the learned Judge to the Jury.

Mr. Serjeant *Cross*, and Mr. Serjeant *Russell*, now shewed cause.—The only question raised by the plead-

ings was, whether the sums of 13,400*l.* and 2,448*l.* were invested, or placed out at interest, with the consent of Sir *Henry Charles Englefield*, according to the directions and on the trusts mentioned in the will of his father, Sir *Henry Englefield*. According to the terms of the power contained in that will, these sums were not to be laid out or invested by the mere acquiescence or oral consent of Sir *Henry Charles Englefield*, the tenant for life; but such consent was required to be signified by deed under his hand and seal, duly attested by two or more witnesses: and, as no such consent was proved to have been given, the ninth plea could not be supported, and the question was not only properly left to the Jury, but their verdict is conclusive and ought not to be disturbed. The act of Parliament for appointing new trustees merely directed that the estates then remaining unsold should be vested in them according to the uses and upon the trusts subsisting under the will; and, although it recited that loans had been made of other parts of the estate by way of mortgage, and that parts had been sold, and the produce invested in the funds, yet it did not sanction the investment, or show that it had been made pursuant to the directions of the will. With respect to the sale of the estate by Lord *Cadogan*, as the surviving trustee, to *Byam Martin*, the Court has expressly decided that such sale was not made in pursuance of the power (a). On that occasion, the question arose on the eighth plea, in which a part only of the will was set out; whilst the ninth embraces the whole terms of the power, by which a consent in writing by the party interested was required, in order to establish a valid and legal sale of any of the estates devised.

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Mr. Serjeant *Bosanquet*, Mr. Serjeant *Peake*, and Mr. Serjeant *Ludlow*, in support of the rule. The only question is, whether the facts proved at the trial are sufficient

(a) See 11 J. B. Moore, 23.

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to establish the ninth plea, on which the issue taken was, not whether the above sums of 13,400*l.* and 2,448*l.* had been placed out at interest in the name of the surviving trustee, *with the consent of Sir H. C. Englefield, by deed under his hand and seal, duly attested*, but whether the money was invested according to the directions of the will. It was proved that the proceeds of the estate sold to *Byam Martin* were invested and applied by Lord *Cadogan* on the trusts mentioned in the will, with the consent and concurrence of *Sir H. C. Englefield*, as he was a party to the deed by which the estate was conveyed; and, although that instrument was held to be void, as it only conveyed the estate, exclusive of the timber then growing upon it, yet the mode of giving the consent was immaterial, and it might have been done through the agent or legal adviser of the tenant for life. After the lapse of so great a length of time, a due authority or direction by *Sir H. C. Englefield*, to make the investment in the manner required by the will, must be presumed, and more especially, as he continued to receive the interest of the sum invested, without raising any objection; and he also ordered the sum he had improperly received for the timber to be transferred to the account of Lord *Cadogan*, which is conclusive evidence of his assent. The only fact for the Jury to determine was, whether the money received for the estate had been invested or not, and it is evident that there had been no misappropriation or misapplication by the trustee, and it was duly invested in his name for the purposes of the will; and, as the consent of *Sir H. C. Englefield* was not traversed, it formed an immaterial issue, and was, in point of fact, admitted. If a consent by deed were necessary, the demandant should have demurred; at all events, he is now precluded from raising the objection, as the act of Parliament not only recites the loan of the greater part of the purchase money of the estate, on mortgage, but also that the residue had been invested in the

funds. It must, therefore, be inferred that it was laid out according to the terms of the will, and that was the only question the Jury had to determine. Besides, the act directed that all the testator's estates should be vested in new trustees, and that the sum secured upon mortgage, and also that invested in the funds, should be assigned and transferred to them. The sale by the trustee must be taken to have been made *bond fide*, and also that the proceeds were duly invested; and, as it is quite evident that the tenant for life actually assented to, and afterwards recognized and adopted the sale, and as it was made for his benefit, the issue raised by the ninth plea was substantially proved, and the question as to the consent of Sir *H. C. Englefield*, was wholly beside the merits of the case, and ought not to have been left to the Jury.

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Lord Chief Justice BEST.—Although we have decided that the sale of the estate by Lord *Cadogan*, the surviving trustee, to *Martin*, was void, it not having been made in pursuance of the power in the will of Sir *H. C. Englefield*, yet it cannot affect the question now before us, which is simply whether the direction of the learned Judge who tried this cause was right, so as to warrant the Jury in finding a verdict for the demandant. Now, I am of opinion, not only that the direction was perfectly right, but that the Jury have properly found that the ninth plea was not proved, or, in other terms, that the allegations therein contained were not supported by the evidence. It is quite clear that the sums for which the estate in question was sold, were not laid out or invested according to the directions of the will. It appears to me to be unnecessary to inquire whether the consent or direction of Sir *H. C. Englefield*, the tenant for life, for the sale of the estate, were made by deed under his hand and seal, and duly attested, or not; for, one of the sums, *viz.* that paid for the timber, was not invested by the trustee,

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although it was afterwards transferred to his account by Sir *H. C. Englefield*, who had improperly received it. Although it is a well known maxim, that *qui facit per alium, facit per se*, yet it cannot apply here, as the Legislature appointed new trustees, on the ground of the imbecility of mind of the son and heir of Lord *Cadogan*, the original trustee. He, therefore, cannot be considered as a party who was ever qualified to act as a trustee; if he had been in possession of his faculties, he might have refused the investment as proposed to be made by Sir *H. C. Englefield*; and, as the act merely appointed other trustees in his stead, it was incumbent on the tenants to show that the sum paid for the timber had been invested according to the directions of the will, and that the estate had been sold according to the trusts therein expressed. As, therefore, the sale was invalid from the beginning, and the whole of the produce was not invested by the surviving trustee according to the terms of the will, I am of opinion that this rule must be discharged.

Mr. Justice PARK (a) and Mr. Justice GASELEE concurring—

Rule discharged.

(a) Mr. Justice Burrough was at Chambers.

Wednesday,
June 18th.

HOLL and BEVAN v. CAROLINE MARY HADLEY.

The plaintiffs
declared on a
guarantee by
the defendant,
to pay for coals

THIS was an action of *assumpsit*.—The *first* count of the declaration stated—That, on the 20th *May*, 1819, at sold by them to *N. H.*, to any amount not exceeding 300*l.*, in case he should not pay for the same within one month after the expiration of a credit of two months from the delivery. Proof, that, according to the custom of trade, the coals were supplied to *N. H.* daily, during the course of a month, and that, on the last day of the month, he gave a bill, payable at two months, for the amount of the coals so delivered:—*Held*, to be a fatal variance.

London, by a certain memorandum of agreement, made between the plaintiffs and one *Nathaniel Hadley* the younger, and the defendant, after reciting that the plaintiffs had, for some time past, supplied the said *Nathaniel Hadley* the younger with coals, on a credit of *two months from the delivery*, and having been requested to furnish coals to an increased amount, which they had declined to do, without having some security for the payment thereof; and that accordingly the said *Nathaniel Hadley* the younger had requested the defendant to become such security, which she had consented to do, the defendant did, in pursuance of such consent, thereby agree to and with the plaintiffs, that she would pay and discharge all such sums of money as might thereafter become due to the plaintiffs for coals sold by them to the said *Nathaniel Hadley* the younger, to any amount not exceeding 300*l.*, in case the said *Nathaniel Hadley* the younger should not pay the same within one month after the expiration of the aforesaid credit of *two months*; and the plaintiffs thereby agreed to give the defendant a further period of three months for making good any claim which they might have to make under the said guarantie, and which should be in equal proportions with *Nathaniel Hadley*, and *Charles Simpkin*, who were also guarantees for the said *Nathaniel Hadley* the younger; and that the defendant might get rid of her responsibility under the said guarantie, at any time, by giving notice in writing of such her intention to the plaintiffs; when it should wholly cease and become void from the time of the delivery to them of the notice. The plaintiffs then—after averring mutual promises, to perform and fulfil the said agreement,—alleged, that they, confiding in the agreement, and in the promise and undertaking of the defendant, afterwards, to wit, on &c. aforesaid, and on divers days between that day and the 1st *June*, 1825, did sell and deliver to the said *Nathaniel Hadley* the younger divers large quantities of coals, the reasonable

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price whereof amounted to a large sum, to wit, the sum of 2,000*l.*, upon the aforesaid credit of *two months*; and that, although, as well the said credit, and the time for payment of the price of the said coals by the said *Nathaniel Hadley* the younger to the plaintiffs, as also one month after the expiration of the said credit, had theretofore elapsed, to wit, on the 1st *September*, 1825, yet the said *Nathaniel Hadley* the younger did not (although requested so to do) pay to the plaintiffs, or either of them, the said sum of money so due and payable to the plaintiffs as aforesaid, or any part thereof, but had wholly neglected and refused so to do; of all which premises the defendant, afterwards, to wit, on &c., had notice: and although the said further period of three months from the expiration of the said credit of *two months*, and the said further time of one month for the defendant's making good the claim which the plaintiffs had under the said guarantie, had long since elapsed; and although the equal proportion of the claim of the plaintiffs to be borne and discharged by the defendant in pursuance of the said agreement, amounted to a large sum of money, to wit, the sum of 300*l.* and the defendant, afterwards, to wit, on the 1st *February* 1826, had notice of the premises, and was then requested by the plaintiffs to pay them the said sum of 300*l.*, yet that she, not regarding her said agreement, &c., had not paid that sum or any part thereof to the plaintiffs.

The second count alleged, that, in consideration that the plaintiffs, at the special instance and request of the defendant, would sell and deliver to one *Nathaniel Hadley* the younger, coals on credit, to wit, *a credit of two months*, she, the defendant, promised the plaintiffs that she would pay and discharge all such sums of money as might thereafter become due to the plaintiffs, for coals sold by them to the said *Nathaniel Hadley* the younger, to any amount not exceeding 300*l.*, in case the said *Nathaniel Hadley* the younger should not pay the same to them one month

after the expiration of the aforesaid credit of *two months*. The plaintiffs then averred, that they sold and delivered to the said *Nathaniel Hadley* the younger divers large quantities of coals, the reasonable price whereof amounted to 2,000*l.*, upon the aforesaid credit of *two months*, and assigned for breach, the non-payment of 300*l.*, as in the first count.

To these were added, the common money counts. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guild-hall*, at the Sittings in the last Term, the plaintiffs proved the agreement as set forth in the declaration, *viz.* a guarantie for the payment of coals to be supplied to the defendant's brother *Nathaniel Hadley* the younger, on a credit of *two months from the delivery*. The plaintiff's clerk, who was called to prove the delivery, stated that the coals were delivered according to the custom of the trade, which was, that coals were supplied to the dealer day by day, during the course of a month, and that, on the last day of the month, the dealer gave a bill at *two months* for the amount of the coals supplied in the course of that month; the dealer thus having a credit of *three months* from the delivery for such of the coals as were supplied on the first day of the month, and more than *two months* credit for every parcel of coals supplied, except such as might be delivered on the last day of the month.

For the defendant, it was contended, that this was a dealing at variance with the express language of the guarantie, which was for a credit of *two months from the delivery*. It was, on the other hand, insisted for the plaintiffs that the delivery being made according to the custom of the coal trade, which it was submitted must have been in the contemplation of the parties at the time the guarantie was executed, the whole supply of coals for each month must be considered as delivered on the last day of the month, which was a delivery within the terms of the guarantie.

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His Lordship however, being of opinion that there was a variance between the terms of the guarantie, and the manner in which the coals had been proved to have been delivered, directed a nonsuit.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule *nisi* that this nonsuit might be set aside, and a new trial granted, on the ground that the delivery, as proved, was within the terms and meaning of the guarantie.

Mr. Serjeant *Bosanquet*, afterwards shewed cause. The nonsuit was proper, as this was not a technical, but a most material variance between the contract as proved, and that set out in the declaration, and one of which the defendant, as surety, is entitled to take advantage. She only undertook to be answerable for coals to be supplied by the plaintiffs to her brother, on a credit of *two months* from the delivery, and the plaintiffs averred a delivery of coals to the brother upon the *aforesaid* credit of two months, which must necessarily refer to two months from the time of delivery; and, if the credit were to be extended to three months from the delivery of such coals as were supplied on the first day of the month, the defendant's responsibility would be greatly enlarged, which she did not contemplate at the time she gave the guarantie. The express meaning of the parties was, that, when the credit of two months from the day of delivery had elapsed, the debt was to accrue, and the principal to be immediately liable. If a large quantity of coals had been delivered on the first day of a month, the party to whom they were supplied might be solvent at the expiration of two months from that day, but not so at the expiration of three, to which the credit would necessarily be extended. So, if coals were delivered in the middle of a month, for instance, on the 15th *September*, the credit would be extended to two months and a half, as the dealer would not give

his bill for two months until the last day of *September*. The defendant, therefore, as a surety, has a right to say, *non hæc in fœderâ veni*. And as the plaintiffs had furnished coals to her brother on different terms than those stipulated by her, or expressed on the face of the guarantie, she cannot be deemed liable; and although it may be said, that the coals were delivered according to the custom of the trade, yet that cannot avail the plaintiffs, as the defendant can only be held responsible according to the express terms of her original undertaking.

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Mr. Serjeant *Wilde*, in support of his rule.—The plaintiffs actually supplied the defendant's brother with coals far exceeding the amount of 800*l*. on the faith of her responsibility and undertaking, and they had dealt with the brother long before the guarantie was given, as the declaration recites that fact, and the *aforesaid credit* of two months must be taken to refer to the former course of dealing between the parties, which was meant to be continued on the same terms. All commercial instruments which have reference to trade, must be governed by the particular custom of the trade to which they relate, and more particularly so, where such instruments refer to a former course of dealing between the parties. Many mercantile contracts are couched in ambiguous terms, and although, here there may be a latent ambiguity on the face of the agreement, yet it may be supplied by evidence; and it was proved that the coals were delivered according to the custom of the trade, by which the days of the first or current month in which the coals were supplied, were not to be reckoned, but that they were considered as being delivered on the last day of that month. The defendant has received no injury by this mode of credit. She could not be liable until default had been made by her principal, and she could not call on the plaintiffs to sue him. The prolongation of credit was rather in her favour than otherwise, for it applied to her as well as to her principal.

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The Court—being inclined to think that there could be no doubt as to the intention of the parties at the time the guarantie was given, as it did not apply to a single transaction, and there had been previous dealings between the plaintiffs and the defendant's brother, to whom coals had been supplied according to the custom of the trade, and the declaration had set out the agreement in terms; and that the word *credit* must be taken to refer to the general understanding of the trade, which might be explained by parol evidence—took time to consider. But—

Lord Chief Justice BEST now said:—We were most anxious to see whether we could not get rid of this nonsuit, but we are clearly of opinion that we cannot. The rule, therefore, must be—

Discharged.

Wednesday,
June 18th.

COATES and Another, Assignees of PLASKETT, a Bankrupt,
v. BAINBRIDGE and Another.

The defendants sent bills of exchange to their agents abroad, who presented them to the drawees, and wrote the defendants that they had received the amount. The defendants afterwards acknowledged the receipt of the letter, and directed the agents to remit the amount to them.

Held, that, as the letter written by the agents, while acting within the scope of their authority as such, was recognized, and its terms adopted by the defendants, it was admissible in evidence to charge the latter with the receipt of the money.

THIS was an action of *assumpsit* for money had and received by the defendants to the use of the plaintiffs, as assignees of one *Plaskett*, a bankrupt.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Hilary* Term, a verdict was taken for the plaintiffs for 956*l.* 5*s.* subject to the opinion of the Court upon a special case, leave being reserved to either of the parties to turn it into a special verdict; and, as the Court, after argument on a former day in this Term, directed several of the points to be re-argued on a special verdict, it is only necessary to state the following

facts as to the admissibility of certain letters in evidence, to which alone the Court confined their opinion:—

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Messrs. *Thomas & Flaherty*, merchants at the *Cape of Good Hope*, to whom *Plaskett* had been in the habit of consigning goods to be sold on his account, owed 1,100*l.* to *Plaskett*, before his bankruptcy, which event took place on the 2d *November*, 1820.

In the month of *September* in that year, *Plaskett* being much pressed for payment by one *Stevens*, to whom he owed 1,000*l.*, he gave him four bills of exchange for 250*l.* each, drawn on Messrs *Thomas & Flaherty*, at six, nine, twelve, and fifteen months, together with a letter of advice to them. After the act of bankruptcy, these bills were returned by *Stevens* to *Plaskett* and cancelled, as, by some mistake, they did not correspond with the letter of advice, and *Plaskett* drew in lieu thereof, four other bills on *Thomas & Flaherty*, at six, nine, twelve, and fifteen months sight, bearing date the 30th *October*. But these bills were not in fact drawn till after the 2d *November*, and *Stevens* indorsed them to the defendants as a collateral security for a debt due to them from him.

In *February*, 1821, the defendants, at the request of *Stevens*, sent these bills, with the letter of advice, and a letter of recommendation which they had procured, to Messrs. *Marsh & Cadogan* at the *Cape*, with authority to them to present them to Messrs. *Thomas & Flaherty* there, to which letter the defendants received the following answer:—

“ *Cape of Good Hope*, 2d *August*, 1821.

Gentlemen,—The arrival of the *Antelope*, on the 11th *ult.*, put us in possession of your favour of the 17th *February* last, inclosing the four bills drawn by Mr. *John Plaskett* on Messrs. *Thomas & Flaherty*, each for 250*l.*, at six, nine, twelve, and fifteen months' sight. For these

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bills we have this day settled, on the conditions of interest deducted, 43*l.* 15*s.*, and of your guaranteeing them against future liability on their payment. The sum thus paid to us this day is 11,475 rix dollars, being 956*l.* 5*s.*, at 140 exchange. For the conversion of this currency, (less our commission), we must wait necessarily until the first government drawing. Hoping that this settlement may favour us with your approbation, we subscribe ourselves very truly yours,

Marsh & Cadogan.

To Messrs. *Bainbridge & Brown, London.*"

Immediately on the receipt of this letter, the defendants informed *Stevens* that the bills had been paid to *Marsh & Cadogan*; to whom they replied, by letter, as follows:—

" *London, November 21, 1821.*

Gentlemen,—We have to acknowledge the receipt of your favour of the 2d *August*, advising your being in possession of ours of the 17th *February*, covering 1,000*l.*, in four bills on Messrs. *Thomas & Flaherty*, who had at once complied with the drawer's wishes; and that you have settled with them on the conditions of discount deducted 43*l.* 15*s.*, and of our guaranteeing them against future liability of payment. This we do with pleasure, because we are assured the circumstances under which these bills were drawn were fully explained to Mr. *Plaskett's* assignees, who are satisfied therewith, and his accounts passed accordingly: we, therefore, engage to hold you harmless for the stipulation you have entered into on our behalf. We observe you have placed to our credit 11,475 rix dollars, being 956*l.* 5*s.*, the amount received, at 140 exchange; and we note, for the conversion of this fund into bills, (less your commission), you must wait the drawing of government. We shall, of course, be glad to receive the amount as soon as you can procure the bills.

and we beg to offer our thanks for your attention to this matter.—Yours very truly,

Bainbridge & Brown.

To Messrs. *Marsh & Cadogan.*”

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The defendants again wrote to *Marsh & Cadogan*, as follows:—

“ *London, April 24th, 1822.*

Gentlemen,—We beg to hand you a triplicate of our last respects, of the 21st *November*, and feel some surprise that you have never since taken the least notice of your engagement to remit us the 11,475 rix dollars received for our account from Messrs. *Thomas & Flaherty*, which, agreeable to your letter of the 2nd *August*, you stated you should do as soon as the government drew. Now, as we know they have since drawn, we can only presume, in the hurry of other engagements, ours has escaped you. Our friend *W. E. Lawrence*, Esq., having occasion to visit the *Cape*, we request, in the event of your not having remitted us the amount, that you will be pleased to pay over to him the 11,475 rix dollars, less your commission.—Yours, &c.

Bainbridge & Brown.

To Messrs. *Marsh & Cadogan.*”

The defendants never received the money from Messrs. *Marsh & Cadogan*, they having failed shortly after the date of their letter of the 2nd *August*.

One of the questions for the opinion of the Court was, whether the above letter of *Marsh & Cadogan* to the defendants, and their answers, were properly received in evidence to charge the defendants with the receipt of the money.

The case came on for argument on a former day in this Term.

Mr. Serjeant *Wilde*, for the plaintiffs.—The letters

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in question were clearly admissible in evidence, and were conclusive to shew that the proceeds of the bills drawn by *Plaskett* on *Thomas & Flaherty*, at the *Cape*, were received by *Marsh & Cadogan* as the agents of the defendants; and, consequently, the sum so received by them must, under the circumstances, be considered as money had and received by the defendants to the use of the plaintiffs, as assignees of *Plaskett*. Although the letter of *Marsh & Cadogan*, of the 2nd *August*, might not of itself be sufficient to shew that they had settled with the drawees of the bills on the conditions therein stated, *as the agents* of the defendants; yet, as the defendants afterwards acted on that letter, and adopted the agreement of *Marsh & Cadogan*, which was proved by the defendants' letter in reply, and the subsequent letter of the 24th *April*, the whole correspondence, taken together, was decisive evidence that the sum for which the verdict was taken was received by *Marsh & Cadogan* as the accredited agents of the defendants, and on their behalf. The letters of the defendants were confirmatory of the acts of their agents. The first letter of advice, of the 17th *February*, gave them authority to present the bills to the drawees, which they accordingly did, and received their amount; and on their informing the defendants that they had settled for the bills on certain conditions, the latter, in answer, expressly agreed to the terms, and said, they did it with pleasure, because they were assured that the circumstances under which the bills were drawn were fully explained to *Plaskett's* assignees, who were satisfied therewith. This, therefore, was such an adoption by the defendants of the acts of *Marsh & Cadogan*, as to entitle the latter to recover on an account stated, which distinguishes this from the case of a letter written by an agent abroad to his principal, containing a mere narrative of the transactions in which he has been employed, as they form no part of the *res gestæ*, but merely an account of them. Here,

however, the defendants adopted the acts of *Marsh & Cadogan*, and afterwards recognized the receipt of the money by them, as their agents, and for their use; and whether the defendants had received it from them or not, the plaintiffs were, under the circumstances, entitled to recover it.

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Mr. Serjeant *Taddy*, *contra*.—The question is, whether there was any legal or admissible evidence of the receipt by the defendants of the sum for which the verdict was taken, so as to entitle the plaintiffs to recover. There was no proof that the defendants had actually received the money, nor could they be charged with its receipt through the medium of Messrs. *Marsh & Cadogan*, their agents or correspondents abroad. The Jury could not act on their letter, and, although it might have been admissible, it was not sufficient to establish the fact of the receipt of the money by the defendants, or even that it had been received on their account. The distinction between those cases in which the declarations of agents affect their principals, and those where other evidence is necessary, was fully discussed in the case of *Fairlie v. Hastings*, where Sir *William Grant* said (a): “The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct, or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord *Kenyon* carried this so far as to refuse to permit a letter by an agent to be read, to prove an agreement by the

(a) 10 Ves. 127.

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principal—holding, that the agent himself must be examined. *Maesters v. Abraham* (a). If the agreement was contained in the letter, I should have thought it sufficient to have proved that the letter was written by the agent; but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." That principle has been since recognized and adopted in *Langhorn v. Allnutt* (b), and in *Kahl v. Jansen* (c), where it was decided, that letters written by an agent abroad to his principal, containing a narrative of the transactions in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them.

[Lord Chief Justice BEST.—It is found as a fact in this case, that, immediately on the receipt of the letter from *Marsh & Cadogan*, the defendants informed *Stevens* that the bills had been paid to *Marsh & Cadogan*; and they afterwards acknowledged that the money was in the hands of those persons as their agents, and requested to have the amount. As, therefore, the defendants admitted that the money was in the hands of their agents, must it not be treated as if it were in the possession of the principals themselves?]

Looking at the whole of the transaction in a mercantile point of view, the letter of *Marsh & Cadogan* contained mere representations only, and afforded no evidence of any particular fact; and, although it stated that they had received a certain sum, it does not follow that it remained in their hands on the defendants' account. If a party voluntarily produces or shews a paper or letter to another, it does not amount to an admission of the facts therein contained. *Senat v. Porter* (d). So, here, the defendants were not bound to believe that the assertion made by their

(a) 1 Esp. Rep. 375.

(b) 4 Taunt. 511.

(c) Id. 569.

(d) 7 Term Rep. 159.

agents was true. They might have given credit to it or not; and, although they have done so, they are not to be concluded by it. In *Roe d. Pellatt v. Ferrars* (a), it was held, that, if a defendant give in evidence an answer in Chancery of the plaintiff, it will not entitle the latter to avail himself of any matters contained in such answer, which are only stated as hearsay; and here, the letter of *Marsh & Cadogan* merely contained their declarations, and ought not to have been received.

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Cur. adv. vult.

Lord Chief Justice BEST now said.—As several points of general importance have been raised in the argument, arising on the facts in this case, we think that it should be turned into a special verdict, when the opinion of another Court may, if required, be taken. It is, however, necessary for us to dispose of one question, and one only, as that cannot be raised on the special verdict, *viz.* whether or not the letter of *Marsh & Cadogan*, the defendants' agents at the Cape, coupled with those of the defendants, were properly received in evidence, and were sufficient to charge the latter with the receipt of the money. We are clearly of opinion that they were so; for, although it has been decided that the letters of an agent abroad to his principal, containing a narrative of the transactions in which he had been employed, are not admissible in evidence against the principal, as the mere representations of the agent; we think the general rule laid down by Lord Chief Justice Gibbs, in *Langhorn v. Allnutt*, is the proper one (b).—"When it is proved that *A.* is agent of *B.*, whatever *A.* does, or says, or writes, in the making of a contract as agent of *B.*, is admissible in evidence, because it is part of the contract which he makes for *B.*, and which, therefore, binds him; but it is not admissible as his account of what passes."

(a) 2 Bos. & Pul. 542.

(b) 4 Taunt. 519.

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Here, the letter was written by *Marsh & Cadogan*, while acting as the agents of the defendants, and within the scope of their authority as such; and the defendants afterwards adopted it, by acknowledging the receipt of the money by them, as well as the terms of the settlement with *Thomas & Flaherty*, on whom the bills were drawn, and acquiescing in the amount placed to their credit. As, therefore, the defendants accredited their agents for what they had done, and assented to the placing of the amount to their credit, that was sufficient to charge them with the receipt of the money.

With respect to the special verdict, we require it to be drawn up, and set down for argument in the course of the next term, as the parties ought not to be prejudiced by any unnecessary delay.

The rule for a special verdict was drawn up accordingly.

Thursday,
 June 19th.

ANN PARKER v. CROLE.

A plea of bankruptcy is no bar to a declaration framed in *tort*, charging the defendant, a stock-broker, with having sold the plaintiff's stock (under a general power with which he and his deceased partner were entrusted), without her permission or direction, and concealing the sale.

THIS was an action on the case. The *first* count of the declaration stated, that, before and at the time of the committing of the grievances thereafter mentioned, the plaintiff was possessed of, and lawfully entitled to, a certain interest or share, to wit, 2,800*l.* share or interest in the joint-stock or fund, commonly called the *three per cent.* reduced annuities, transferable at the Bank of *England*, the said 2,800*l.* share or interest then standing in the name of the plaintiff in the books of the Governor and Company of the Bank of *England*, and being of great value, to wit, of the value of 2,000*l.* of lawful money, to wit, at &c. And that, before and at the time of the committing of the grievances by the defendant and one *John Tenbrocke*, thereafter mentioned, the defendant and the said *John Tenbrocke* (since deceased) carried on the trade or business of stock-brokers in co-partnership together, to wit, at &c.,

and the plaintiff, before the time of the grievances, to wit, on &c., at &c., retained and employed the defendant and the said *John Tenbrocke*, deceased, in his life-time, as such partners and brokers as aforesaid, for certain reasonable reward to the defendant and the said *John Tenbrocke* in that behalf, and then and there made and delivered to the defendant and the said *John Tenbrocke*, as such partners and brokers as aforesaid, a certain letter or power of attorney made and executed by the plaintiff to the defendant and the said *John Tenbrocke*, since deceased, whereby she, the plaintiff, made and constituted them, the defendant and the said *John Tenbrocke*, or either of them, her true and lawful attornies or attorney, for her and in her name from time to time to receive all such dividend or dividends as should from time to time accrue or become due to the plaintiff upon or in respect of her said share of and in the said fund or stock, and for her and in her name, and as her act and deed, to make sale of the said share of and in the said fund or stock, or any part thereof; and, thereupon, it then and there became and was the duty of the defendant and the said *John Tenbrocke*, deceased, as such brokers and partners as aforesaid, in all things to obey, abide by, and fulfil, the orders and directions of her, the plaintiff, in and about the using of the said letter of attorney, and in and about the management and selling of the said share of her, the plaintiff, of and in the said stock or fund, under or by virtue of the same letter or power of attorney. The plaintiff then averred, that, at the time of delivering the said letter or power of attorney to the defendant and the said *John Tenbrocke* as aforesaid, to wit, on &c., at &c., she, the plaintiff, did direct and order them, the defendant and the said *John Tenbrocke*, as such brokers of her, the plaintiff, not to sell, dispose of, or transfer the said share or interest of her, the plaintiff, in the stock aforesaid, or any part thereof, without receiving permission and direction of and from her, the plaintiff,

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for that purpose; that the defendant and the said *John Tenbrocke* then and there received the same letter or power of attorney of and from the plaintiff, under and subject to that proviso, and upon such condition; yet the plaintiff in fact said, that the defendant and the said *John Tenbrocke*, well knowing the premises, but not regarding their duty as such brokers as aforesaid, nor the orders and directions so given to them by the plaintiff, but contriving, &c., to deceive and defraud the plaintiff in this behalf, afterwards, to wit, on &c., at &c., wrongfully, and injuriously, and without any permission, direction, or instruction whatever from her, the plaintiff, for that purpose, and against the knowledge and consent of her, the plaintiff, sold and disposed of the said share or interest of the plaintiff in the stock aforesaid, and converted and disposed of the proceeds thereof to their own use, to wit, at &c.; and the defendant and the said *John Tenbrocke* then and there, and for a long space of time, to wit, for the space of four years then next following, craftily and fraudulently pretended to the plaintiff, to wit, at &c., that her said share or interest of and in the stock aforesaid, during the time aforesaid, remained unsold and standing in her, the plaintiff's, name in the books of the Governor and Company of the Bank of *England*, and during all the time aforesaid, there, craftily, falsely, and fraudulently, concealed from the plaintiff that they had so sold and disposed of her said share or interest; whereby the plaintiff, during all the time aforesaid, and until the death of the said *John Tenbrocke*, and until the estate of the said *John Tenbrocke* became and was wholly insolvent, was prevented and hindered from commencing any action or suit against the defendant and the said *John Tenbrocke*, or either of them; and the plaintiff hath thereby lost and been deprived of all availing remedy against the estate of the said *John Tenbrocke*, to wit, at &c.

The second count,—after reciting that the plaintiff was possessed of certain stock; that the defendant and *John*

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Tenbrocke were stock-brokers and co-partners, and were retained by the plaintiff in and about the transacting of the business of the plaintiff relative to her said stock; and that it thereupon became and was the duty of the defendant and *John Tenbrocke*, deceased, as such stock-brokers, to obey and fulfil the orders and directions of her, the plaintiff, touching and concerning the same share or interest in the said stock, and not to sell or dispose of the same without the consent and direction of the plaintiff in that behalf—stated—That the defendant and *John Tenbrocke*, deceased, not regarding their duty as such stock-brokers, but contriving, &c., to deceive and defraud the plaintiff in that behalf, wrongfully, and injuriously, and without the consent or direction of the plaintiff, and against her will, sold and disposed of the said last mentioned share or interest in the said public fund or stock, and fraudulently and deceitfully took, had, and disposed of the money arising from such sale to their own use; and the defendant and the said *John Tenbrocke*, for a long space of time, to wit, until the death of the said *John Tenbrocke*, falsely, fraudulently, deceitfully, and knowingly, concealed from the plaintiff that they had so sold and disposed of her said share or interest last aforesaid, and during the time aforesaid, falsely, knowingly, fraudulently, and deceitfully, represented and pretended to the plaintiff that her said share or interest last aforesaid still remained standing in her name in the books of the Governor and Company of the Bank of *England*, and thereby the plaintiff, during the time aforesaid, was prevented from commencing any action or suit against the defendant and the said *John Tenbrocke*, for the said breach of duty in that count mentioned; and the plaintiff, by reason of the said several premises in that count mentioned, had wholly lost and been deprived of her said share or interest of and in the said public fund or stock in that count mentioned; and, in addition thereto, by means of the premises, and of the

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said *John Tenbrocke* having since died insolvent, she, the plaintiff, had been and was prejudiced and hindered in and about recovering lawful compensation in respect thereof, and had been and was otherwise greatly injured and damnified.

The *third* count—after reciting that the plaintiff was possessed of, and lawfully entitled to, certain other stock—stated—That, before and at the time &c., the defendant was a stock-broker; that, being such, theretofore, to wit, on &c., at &c., the plaintiff duly signed and executed a certain power of attorney authorizing and empowering him, the defendant, and one *John Tenbrocke*, deceased, amongst other things, to sell and dispose of the said last mentioned share or interest in the stock aforesaid for and on account of her, the plaintiff, and, for certain reasonable reward in that behalf, retained and employed the defendant and the said *John Tenbrocke*, as such stock-brokers as aforesaid, for the purpose, amongst other things, of so selling and disposing of the said last mentioned stock, and in the mean-time receiving the dividends thereon. The plaintiff then averred, that she did, afterwards, to wit, on &c., deliver the said last mentioned warrant of attorney to him, the defendant, and the said *John Tenbrocke*, and did order and direct the defendant and the said *John Tenbrocke* to keep the said power of attorney in their care and custody, for the purpose of selling and transferring the same share and interest on account of and for the benefit of the plaintiff, when they, the defendant, and *John Tenbrocke*, should be afterwards duly instructed and directed by the plaintiff in that behalf; and that the defendant and *John Tenbrocke*, deceased, accepted and received the said last mentioned power of attorney in the manner and for the purpose last aforesaid; that, thereupon it became and was the duty of the defendant and *John Tenbrocke*, deceased, to retain and keep the same power of attorney for the purpose aforesaid, and not to act upon the same in selling

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the said share or interest of the plaintiff in that count mentioned, until they, the defendant, and *John Tenbrooke*, should be duly authorized and directed by the plaintiff in that behalf; yet, that the defendant, not regarding his duty in that behalf, but contriving, &c., to injure and defraud the plaintiff, afterwards, to wit, on &c., at &c., wrongfully and unjustly, and against the will and consent of the plaintiff, and without having received any direction, authority, or order, from her in that behalf, sold and disposed of the said last mentioned share or interest in the stock aforesaid under and by means of the said power of attorney, and fraudulently and deceitfully took and received the produce thereof, amounting to a large sum of money, to wit, the sum of 2,000*l.*, to his own use and benefit, and thereby, and by means of the premises last aforesaid, she, the plaintiff, had lost and been deprived of the said last mentioned share and interest in the said stock, being of the value aforesaid, and had been and was otherwise greatly damnified.

To this declaration the defendant pleaded—

First,—The general issue.

Secondly,—That, after the committing of the grievance in the declaration mentioned, and before the commencement of the suit, he, the defendant, became bankrupt, &c.

Thirdly,—As to the converting and disposing of the proceeds of the said share or interest of the plaintiff in the said stock, as in the said first count mentioned, and as to the taking and disposing of the money arising from the sale of the said share or interest of the plaintiff in the said public stock or fund, as in the said second count mentioned; and as to the taking and receiving the produce of the said share or interest of the plaintiff in the said stock, as in the said third count mentioned, by the defendant above supposed to have been done, the defendant said that the plaintiff *actionem non* &c.; because she said, that, after the

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committing of the said several supposed grievances in the introductory part of the plea mentioned (if any such were committed), and before the commencement of this suit, to wit, on &c., he, the defendant, became a bankrupt within the true intent and meaning, &c., to wit, at &c., and that the said supposed causes of action in the introductory part of this plea and in the said declaration mentioned (if any such there be), and each of them, did accrue to the plaintiff before he, the defendant, became a bankrupt as aforesaid, to wit, at &c. aforesaid.

The plaintiff joined issue on the first plea; and demurred generally to the second, and specially to the third, assigning for cause—that the defendant had not, in or by his said last plea, made, or attempted to make, any answer to any of the material averments and things in the said declaration contained; but that, on the contrary thereof, the said last plea was wholly confined to certain matters in and by the said declaration alleged as matters of aggravation only; and for that the said last plea was, in divers other respects, informal, insufficient, &c. The defendant joined in demurrer.

The cause now came on for argument, when—

Mr. Serjeant *Wilde*, in support of the demurrer, was stopped by the Court, who called on—

Mr. Serjeant *Stephen* to support the second and last pleas.

The bankruptcy of the defendant is a complete bar to the whole action, or, at all events, to the charge of the sale and conversion of the stock to the defendant's use. The plaintiff has alleged,—*first*, that the defendant sold her stock without her knowledge or consent;—*secondly*, that he has converted it to his own use;—and *lastly*, that he concealed the sale from the plaintiff, whereby she was deprived of any availing remedy she might have had against

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the estate of *Tenbrocke*, an alleged joint wrong-doer. With respect to the alleged loss the plaintiff had sustained as against *Tenbrocke's* estate, it forms no relevant part of the declaration, but was a mere manœuvre of the pleader to shew that the transaction savoured of fraud. It was, therefore, unnecessary to notice or answer it in the plea, for the defendant alone is charged with the whole cause of action, as survivor of *Tenbrocke*, and the plaintiff has not alleged that he is insolvent, nor can that fact be presumed by the Court. If, therefore, the plaintiff was entitled to recover the whole of her demand from the defendant, and he is chargeable with the full amount of the debt, if he were in solvent circumstances, the plaintiff could have sustained no damage by the failure or insolvency of *Tenbrocke*. Besides, the plaintiff's demand was in the nature of liquidated damages, and capable of being ascertained at the time of the bankruptcy. The plaintiff, therefore, might and ought to have proved her debt under the commission, and, although the declaration is framed in *tort*, yet the *tort* might have been waived. The plaintiff had her remedy by *indebitatus assumpsit*; or she might have proved under the commission, as for money had and received by the defendant to her use. As no special damage is alleged, the substantial cause of action, or measure of the damages the plaintiff has sustained, is the value of the stock sold, or the proceeds which the defendant actually received. The plaintiff has averred that the stock was sold without her knowledge or consent; but that was a mere breach of trust, for which she had a remedy in equity. It must be admitted, that a creditor cannot prove under a commission where he founds his demand solely upon a *tort*, in which case the damages are contingent and uncertain, *vis.* for an assault and battery, as in *Walter v. Sherlock* (a), or in trespass for mesne profits, *Goodtitle v. North* (b); yet, if a demand

(a) 3 Wils. 272, n.

(b) 2 Doug. 584.

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be such that the amount can be liquidated and ascertained without the intervention of a Jury, it is quite clear that it may be proved under a commission, and that a plea of bankruptcy and certificate is an answer to such demand; and there is no authority to shew, that, in such a case as the present, a plaintiff can have the option of proceeding for a *tort*, by the mere statement of collateral facts in the declaration. If such a doctrine were to prevail, it would tend to contravene the policy of the bankrupt laws, by which a party who surrenders all his estate and effects for the benefit of his creditors, is protected from all actions or suits on contracts entered into previous to his bankruptcy. In *Forster v. Surtrees* (a), where, by agreement between the plaintiffs and defendants, who were bankers, the plaintiffs were to send to the defendants weekly all their own notes and the notes of certain other banking-houses, and the defendants were, in exchange, to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs, at a certain date—it was held, that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes, according to the agreement; but, if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, proveable under a commission against the defendants; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants, who had obtained their certificates. There, the plaintiffs declared in *assumpsit*, although they had their election to waive their claim as for a debt arising upon the contract, and sue in *tort* for damages for the breach of it. Lord *Ellenborough* there said (b): “ When a bankrupt is discharged by

(a) 12 East, 605.

(b) Id. 612.

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his certificate from a debt in one form, how can he be charged by the creditor in another form of action for the same debt? This is substantially the subject-matter of a debt, and not the case of a mere breach of duty for which the plaintiffs could have declared for or recovered any special damage *ultra* the debt for which the bill was to be given." So, here, the plaintiff's cause of action is in substance the subject-matter of a debt by the sale of the stock, and she could not be entitled to recover any special damage beyond it. Mr. Justice *Bayley* said: "The amount of the sum which the plaintiffs would have a right to demand, in any case, for a breach of the agreement, would be liquidated damages." In *Parker v. Norton* (a), it was held, that, where a party has his election either to bring trover or an action for money had and received, he might maintain the former notwithstanding the bankruptcy of the debtor after the cause of action accrued. There, the plaintiff, being the owner of a bill of exchange, entrusted it to the defendant in order that he should obtain payment when it became due, instead of which he, in violation of his trust, and without waiting for the day of payment, discounted the bill, received less than its value, and applied the money to his own use; and, although that was a most dishonest transaction, Lord *Kenyon* said, that, "if the plaintiff, after considering what remedy he should take, had brought an action for money had and received, he would have affirmed the act of the defendant, and the bankruptcy and certificate would have been an answer to that action." Here, it does not appear on the face of the record that the plaintiff has sustained any damage beyond the loss of the stock, the value of which might have been easily ascertained and proved under the commission. It might have been sold or transferred by *Tenbrocke* without the knowledge or assent of

(a) 6 Term Rep. 695.

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the defendant, and if so, he cannot be said to have been guilty of a conversion or concealment; and, if the allegation of that latter fact be struck out of the declaration, there can be no doubt but that the plaintiff's demand was reduced to a debt which might have been liquidated and ascertained at the time of the bankruptcy.

Lord Chief Justice BEST.—If we were to decide in favour of the argument which has been so ingeniously pressed upon us for the defendant, we should not only overturn all the cases from *Uttersen v. Vernon* (a) to the present time, but contravene the first principles of the bankrupt laws, by one of which a party who has duly conformed and obtained his certificate is protected against all debts which have been fairly or *bona fide* contracted, but not against those which have been incurred through his own misconduct or fraud. In *Goodtitle v. North*, it was held that bankruptcy is no plea in bar to an action for mesne profits; and Lord *Mansfield* there said: "The plaintiff goes for the whole damages occasioned by the *tort*, and when damages are uncertain they cannot be proved under a commission of bankruptcy." In *Parker v. Norton*, it was established, that, if a party had a remedy by action for a fraud, although he might waive the *tort* and sue on the contract, or prove his debt under a commission, yet, if he did not elect to waive the *tort*, but founded his action upon the fraud, the certificate would be no bar. What, then, are the facts of this case, as disclosed on the face of the declaration? It appears that the plaintiff, a female, being the owner of stock, employed the defendant as her broker, and entrusted him with a power to sell the stock as well as to receive the dividends, directing him, when the power was delivered to him, not to sell or transfer the stock without her permission; but that, in direct violation of

(a) 3 Term Rep. 548.

such order, he sold the stock and concealed the sale from the plaintiff, and that she remained ignorant of it until the death of the defendant's partner, who died insolvent. The plaintiff, therefore, was clearly defrauded by the defendant's abuse of the power committed to his care; and, although the deceased partner might alone have been cognizant of the fraud, the plaintiff had a right to recover as against both; and, on the death of one, she was entitled to pursue her remedy against the other. The narrow ground on which I think this case ought to be determined, is that of fraud, and if so, the language of Lord *Kenyon*, in *Parker v. Norton*, is expressly in point, for, said his Lordship (a), "Some of the arguments that have been addressed to us on behalf of the defendant are founded on the supposition that this is a compassionate case; even if that supposition were true, we could not decide in his favour against the rules of law. But, if ever a case was brought before a Court of justice, that was entitled to less favour than others, this, as it is disclosed on the part of the defendant, is that case. When the case of *Goodtitle v. North* was argued here, Lord *Mansfield* put an end to it, by one observation, 'the form of the action is decisive.'" That is the ground on which I put this case: and Mr. Justice *Grose*, said (b): "The question here is, not whether or not the plaintiff *might* have proved his debt under the defendant's commission; but whether *he was bound* to do so; and if he were not, the certificate is no bar to this action. What Lord *Mansfield* said, in the case of *Goodtitle v. North*, is decisive of the present case; and even without that authority, I would not consent that the whole system of the bankrupt laws should be converted into a system of fraud by the bankrupt himself. This is not a debt arising out of any contract of the parties; but if it be a debt at all, it arises out of the misconduct of the defendant." That appears to me to be expressly in point;

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(a) 6 Term Rep. 699.

(b) Id. 700.

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and although in this case the plaintiff might have waived the *tort* and sued in *assumpsit*, by which she would have affirmed the act of the defendant in the sale of the stock, yet she was not bound to do so, and she has expressly alleged, that the sale was against her order and consent. She is, therefore, entitled, not only to receive compensation in damages, according to the value of the stock sold, but to recover from the defendant, on the ground of fraud and a breach of the trust and confidence reposed in him. The case of *Forster v. Surtees* does not touch this. The plaintiffs there declared in *assumpsit* for the breach of an agreement, and the Court did not mean to intrench upon or over-rule the previous decisions in *Utterson v. Vernon*, and *Parker v. Norton*, but Lord *Ellenborough* took the distinction, and said (a): "This is substantially the subject-matter of a debt, and not the case of a mere breach of duty for which the plaintiffs could have declared for or recovered any special damage *ultra* the debt for which the bill was to be given." There, the plaintiff's cause of action was founded substantially on a contract, and he could have had no remedy but by *assumpsit*, as there was no wrong, independently of the breach of the agreement. But where the demand is of a mixed nature, and the creditor may claim either as founding upon contract, or as for a *tort*, he may make his election, and will be entitled to prove or not accordingly. So, in equity, if a plaintiff might have proceeded at law for that which he demands by his bill, either by an action of *assumpsit*, or an action for the *tort*, the bill may be demurred to if it be in the nature of an action for the *tort*, but if it be in the nature of an action of *assumpsit*, the defendant may plead his bankruptcy and certificate—*De Tastet v. Sharpe* (b). So here, if the plaintiff had waived the *tort*, and sought to recover damages in *assumpsit*, for the mere breach of contract, the

(a) 12 East, 612.

De Tastet v. Walker, Buck's Bank-(b) 3 Madd. 51; *S. C. nomine* Bankruptcy Cases, 153.

bankruptcy and certificate might have been a bar to the action; but, as the declaration is framed in *tort*, for the fraud or misconduct of the defendant, I am of opinion that the plaintiff is entitled to judgment.

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Mr. Justice BURROUGH (a).—Not only the form of the action in this case, but the allegations in the different counts of the declaration, are decisive to show that the defendant has been guilty of misconduct for which he is liable in *tort*. It is averred that the plaintiff, being possessed of stock, directed the defendant, as her broker, not to sell or transfer it without her permission, but that he fraudulently sold it in defiance of such direction, and concealed the sale from her. This action, therefore, was well brought, according to the case of *Parker v. Norton*; and Lord Kenyon, Mr. Justice Ashhurst, Mr. Justice Grose, and Mr. Justice Lawrence (who was a most eminent pleader and excellent lawyer), all agreed, that, in a case of fraud, a party is not bound to prove his debt under a commission, but that he may waive the contract and sue for the *tort*. If a party purchase a horse warranted sound, and he turn out to be otherwise, and the seller becomes a bankrupt, the buyer has his remedy by an action in the nature of *tort* for the deceit, or by *assumpsit* on the warranty; in the one case, the debt could not be proved under the commission, but in the other it might; and in the latter instance the certificate would be a bar.

Mr. Justice GASELEE.—The decision of the Court of *King's Bench*, in *Parker v. Norton*, has established a sound principle, which has never been contravened, or even attempted to be impugned. Where a party has a remedy by an action of *tort*, he cannot be compelled to sue in *assumpsit*; and here, although the declaration might have

(a) Mr. Justice Park was absent.

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been framed differently, and other allegations introduced, as to the loss of dividends by the plaintiff, still, as it is averred that the defendant sold the stock contrary to the direction of the plaintiff, and concealed the sale, it is sufficient. It is most indiscreet to entrust a broker with a power to sell, for if, after a sale, he regularly pay the dividends as they become due, he lulls all suspicion, and the party remains ignorant of the sale. Although the plaintiff might have been entitled to recover in an action for money had and received, yet as the sale was made without her knowledge, though it might have been effected by *Tenbrocke*, still this defendant is liable in this form of action, and consequently the pleas demurred to cannot avail him.

Judgment for the plaintiff.

Thursday,
June 19th.

CARTER and two Others v. SANDERSON.

By letters patent of *Charles* the second, the Coopers' Company were empowered to make such reasonable orders and ordinances as to the master and wardens should seem meet, for the good order, rule, and government of the company. By a bye-law in the reign of *George* the Second, the master and wardens were yearly to elect three per-

THIS was an action of debt, by the master and wardens of the Coopers' Company, against one of their stewards, for the recovery of a penalty incurred by him under a bye-law, for not providing a dinner for the company on Lord Mayor's Day. The declaration recited, that King *Henry* the seventh, by his letters patent, under the Great Seal of *England*, bearing date at *Westminster*, the 29th day of *April*, in the sixteenth year of his reign, granted and gave licence to six of his beloved subjects therein named, citizens and coopers of the art and mystery of coopers of his city of *London*, some or one of them, to make, create, erect, found, and establish, a fraternity, or perpetual guild, of one master and two keepers of the commonalty of freemen of

sons of the livery to be stewards, who were to provide a dinner for the whole of the livery on Lord Mayor's Day (with such allowance out of the stock of the company as the master and wardens for the time being should think fit); and if any person elected steward should refuse to provide the dinner, he was to forfeit 20*l.* to the use of the company, unless he would make oath in writing before a magistrate, that he was not worth 300*l.* at the time of his election or taking the oath:—*Held*, that such bye-law was bad, and that the allowance to be made by the Company being a condition precedent, the declaration was insufficient for want of an averment to that effect.

the mystery of coopers, residing, or thereafter to reside, in his said city, and suburbs of the same; and that the said master, two wardens or keepers, and commonalty, after such erection, foundation and establishment, at all times to come, should remain one body in itself and one corporate commonalty, by and under the name of master and wardens or keepers of the commonalty of freemen of the mystery of coopers of *London*, and suburbs of the same city, with power to purchase, possess, and receive in fee and perpetuity, lands, tenements, rents, and other possessions whatsoever, which should not be held of the King *in capite*; and that the said master, wardens or keepers and commonalty should have perpetual succession and a common seal to serve for sealing the deeds and businesses of the said mystery and fraternity or guild for ever; and that the said master, wardens, &c., and their successors, should plead and be impleaded and sue in all actions, &c., and answer and defend the same under the name aforesaid, and that such master, wardens or keepers and commonalty, after such erection, foundation and establishment, every year, might choose and make out of themselves a master and two wardens or keepers, to oversee, rule, and govern the mystery and commonalty; and that such master, &c., &c., so elected, after such election, should be master, &c., until a new election should be made; that the master, wardens or keepers, and commonalty for the time being, might lawfully, and with impunity, make lawful and honest meetings, and make *reasonable laws, statutes, and ordinances for the wholesome rule and government of the said mystery, according to the exigency of necessity*, as often as and when need should be, so as such laws, statutes, and ordinances should not any-ways be against the laws and customs of his said kingdom of *England*, which said letters patent the persons therein named accepted; that one of those persons, in the 19th year of the reign of *Henry* seventh, by force and authority of the said letters patent, by his writing, sealed with his seal, and now

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lost or destroyed by time and accident, made, created, erected, founded, and established a certain fraternity, or perpetual guild, of one master and two wardens or keepers of the said commonalty of freemen of the said mystery of coopers, and made and ordained a master and wardens, and gave and granted them all advantages, liberties, and privileges, which, by means of the said letters patent, could be given, assigned, or conferred; that, by certain letters patent of his late Majesty King *Charles* the second, under his great seal of *England*, bearing date at *Westminster*, the 13th day of *August*, in the 13th year of his reign, after reciting that he had seen the letters patent of the late King *Henry* the seventh, and after setting forth the same, it was made known, that the patent, and all the powers, &c., therein contained, should be confirmed; nevertheless, for the better order, rule, and government of the said master, wardens or keepers of the commonalty aforesaid, his said late Majesty King *Charles* the second, did (amongst other things, by which other additional privileges were conferred) declare, that the master, wardens, and assistants of the said company for the time being, or the greater part of them, at any time or times respectively, should or might *have full power and authority by virtue of the said last-mentioned letters patent, to make, ordain, constitute, appoint, and set down such reasonable orders and ordinances in writing, as to them, the said master, wardens, or assistants, or the greater part of them, for the time being, should seem meet and necessary*, according to their good discretion respectively, as well for and concerning the oaths that should be administered to the master, wardens, assistants, and freemen of the said company and the necessary officers of and concerning the same, *and also for the good order, rule, and government of the master, wardens, assistants, and commonalty aforesaid, and all other members of the said society or thereunto belonging, in and touching all necessary matters and things concerning the same; and that, whensoever the said master and wardens for the time*

being should make, ordain, and establish such orders, acts, and ordinances as aforesaid, they respectively should have power therein to provide and limit such reasonable pains, penalties, and punishments, either by fines or amerciaments, or by any other lawful ways or means whatsoever, upon all offenders, breakers, neglecters, or not observers of the same, or any of them, as to them the master, wardens, and assistants of the said company, or the major part of them for the time being respectively, should think fit, necessary, and convenient; and that, thereupon, or at any time after, the said master, wardens or keepers of the commonalty of freemen of the mystery of coopers, *London*, and of the suburbs of the same city aforesaid, or such of them whom it did concern, should or might, by virtue of the said last-mentioned letters patent, have, levy, recover, and take the said fines and amerciaments by actions of debt, or by distress of the goods and chattels of such offender or offenders, according to the laws and statutes of this realm; and the same fines and amerciaments so levied and taken, should and might retain, convert, and enjoy, to and for the common use and supportation of the said commonalty;—all which acts, orders, and ordinances so as aforesaid to be made, his said late Majesty King *Charles* the second did will should be observed and kept, under the pains and penalties therein to be contained, so as always such orders, ordinances, fines, and amerciaments be reasonable and not repugnant or contrary to the laws and statutes of his said late Majesty King *Charles* the second's realm of *England*, nor contrary to the due custom of his city of *London*.

The plaintiffs then averred, that, after the making of the said letters patent of his said late Majesty King *Charles* the second, and after the acceptance thereof, and before the commencement of this suit, to wit, on the 3rd day of *March*, in the fourteenth year of the reign of our late sovereign Lord King *George* the second, one *Bartholomew Clark*, then being master of the said company, and one

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Daniel Lambert and one *John Harcourt*, then being wardens of the said company, and the major part of the then assistants of the said company being then assembled together at the common hall of the said company, commonly called *Coopers' Hall*, situate and being at *London* aforesaid, did, by virtue of the power and authority by the said letters patent of his said late Majesty King *Charles* the second to them given and granted, *make, ordain, constitute, appoint, and set down such reasonable orders in writing* as to them seemed meet and necessary, according to their good discretion respectively, as well for and concerning the oaths which should be administered to the master, wardens, assistants, and freemen of the said company and the necessary officers of and concerning the same, as also for the good order, rule, and government of the master, wardens, assistants, and commonalty aforesaid, *and all other members of the said society*, or thereunto belonging, *in and touching all necessary matters and things concerning the same*, and not repugnant or contrary to the laws and statutes of this realm, nor contrary to the due custom of the said city of *London*; and by one of which said orders and ordinances it was then and there, and is (amongst other things) ordained and established by the then master, wardens, and the major part of the then assistants of the said company, by the authority aforesaid, *that, every year, on the first Tuesday in June, or within eighteen days then next after, the master, wardens, and assistants of the said society for the time being, or the greater part of them, should or might elect or choose three persons, being of the livery of the said company, to be stewards of the same company, to provide, at their own proper costs and charges, (with such allowance out of the stock of the said company, or otherwise, as the master, wardens and assistants of the said company for the time being, or the major part of them, should think fit and convenient to be allowed in that behalf), on the day when the Lord Mayor should be pre-*

*sented at Westminster to take his oath, one dinner, at the common hall of the said company, for the whole livery or clothing thereof; and, if any person or persons so chosen steward or stewards aforesaid, should refuse to serve or hold the office of steward, and to do and perform as aforesaid, having no reasonable cause to the contrary, to be admitted and allowed of by the said master, wardens, and assistants for the time being, or the major part of them, then each and every of them so refusing should forfeit and pay to the master and wardens of the company, upon reasonable demand, the sum of 20*l.* to the use of the company;—provided always, that, if any person so elected as aforesaid, should, within the space of one calendar month after notice given him of such his election, go before one of his Majesty's Justices of the Peace for the city of *London*, or county of *Middlesex*, and make oath in writing that he was not, at the time of such election, or at the time of such making oath as aforesaid, worth to the value of 300*l.* of lawful money of *Great Britain*, in estate real or personal, of any sort, kind, or nature whatsoever, or to that or the like effect, and should, within the time aforesaid, produce and leave the said writing with the master and wardens of the company, or either of them;—then, and in such case, every such person should be wholly excused, freed, and discharged from all payments, fines, and forfeitures incurred by the not conforming to the said ordinance; and in case any such person should, in a subsequent year or years, be elected again into the said office of steward of the said company, such person, again making oath in writing, and producing and leaving it as aforesaid, should be excused, freed, and discharged as aforesaid, and so as often as the like case should happen: which said orders, bye-laws and ordinances, were afterwards, to wit, on the 3d day of *June*, in the year of our Lord, 1741, to wit, at *London* aforesaid, examined and duly approved, ratified, and confirmed by the Right Honourable *Philip* Lord*

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Hardwicke, Baron of *Hardwicke*, then Lord High Chancellor of *Great Britain*, Sir *William Lee*, Knight, then Lord Chief Justice of his late Majesty King *George* the second's Court of *King's Bench*, and Sir *John Willes*, Knight, then Lord Chief Justice of his late Majesty King *George* the second's Court of *Common Pleas*, according to the form and effect of the statute in such case made and provided; of which said orders, bye-laws, and ordinances, the defendant, afterwards, to wit, on the 5th day of *June*, in the year of our Lord 1827, to wit, at *London* aforesaid, had notice. The plaintiffs then averred, that, after the making of the said orders, bye-laws, and ordinances as aforesaid, and after the same were so examined, approved, ratified, and confirmed as aforesaid, and before the commencement of this suit, to wit, on the 28th day of *May*, in the year last aforesaid, being the *Monday* next before the feast of *Pentecost*, otherwise called *Whitsuntide*, in the year last aforesaid, to wit, at *London* aforesaid, the plaintiff, *Robert Carter*, was duly elected master of the said company, and the plaintiffs, *Abraham Algar* and *James Francis Firth*, were duly elected wardens of the said company; and that the plaintiffs, afterwards, to wit, on the said 5th day of *June*, in the year last aforesaid, being the first *Tuesday* in *June*, in the year last aforesaid, at &c. aforesaid, were respectively duly sworn into the said offices of master and wardens of the said company, and from thence hitherto have been and still are respectively master and wardens of the said company; and that, after the making of the said orders, bye-laws, and ordinances as aforesaid, and after the same were so examined, approved, ratified, and confirmed as aforesaid, and after the defendant had notice of the same, and before the commencement of this suit, to wit, on the said 5th day of *June*, in the year last aforesaid, being the first *Tuesday* in *June*, in the year last aforesaid, to wit, at &c. aforesaid, the defendant and one *Heffield Rosling*, and one *Thomas Giles* (they, the defendant, the

said *Heffield Rosling*, and the said *Thomas Giles*, then and there being respectively of the livery of the said company), were, by the then master and the then wardens of the said company, and the major part of the then assistants of the said company for the time being, duly elected and chosen to be stewards of the said company, for the purpose in the said bye-law mentioned; of which said election and choice of him, the defendant, he, the defendant, afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, had notice. The plaintiffs then averred, that, although the defendant, afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, was in due manner summoned to be and appear at the meeting of the said company to be holden on the 9th day of *November*, in the year of our Lord 1827, (being the day on which the Lord Mayor for the said city was presented at *Westminster* to take his oath), to take upon himself the office of one of the stewards of the said company as aforesaid, and although, afterwards, to wit, on the said 9th day of *November*, in the year last aforesaid, the Lord Mayor for the said city was presented at *Westminster* to take his oath, to wit, at &c. aforesaid; and although he, the defendant, did not, within the space of one calendar month after notice given him of such his election as aforesaid, go before one of his Majesty's Justices of the Peace for the said city of *London*, or county of *Middlesex*, and make oath in writing, that he the defendant was not, at the time of such election, or at the time of such making oath as aforesaid, worth to the value of 300*l.* of lawful money in estate real or personal, of any sort, kind, or nature whatsoever, or to that or the like effect;—yet, the defendant, not regarding the said orders, bye-laws, and ordinances as aforesaid, did not, nor would provide for the whole livery or clothing of the said company, a dinner, on the said day when the Lord Mayor for the said city was presented at *Westminster* to take his oath, nor serve or hold his said office of steward, but the defendant (although he had no reasonable cause to

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the contrary,) then and there wholly neglected and refused so to do, to wit, at &c. aforesaid; by means whereof, and by virtue of the said bye-law, he, the defendant, after the making of the said bye-law, to wit, on &c. last aforesaid, at &c. aforesaid, forfeited, and became liable to pay, and ought to have paid to the plaintiffs, so being the master and wardens of the said company as aforesaid, upon reasonable demand, a large sum of money, to wit, the sum of 20*l.* of lawful money, to the use of the said company, which said sum of money last mentioned, although, afterwards, to wit, on the 1st *January*, 1828, and often afterwards, to wit, at &c. aforesaid, reasonable demand thereof was made upon the defendant by the plaintiffs, so being the master and wardens of the said company as aforesaid, is still due and unpaid: by reason whereof, an action hath accrued to the plaintiffs, &c.

The *second* count charged the defendant with not taking upon himself, or serving the office of one of the stewards of the company, nor providing a dinner on Lord Mayor's day, for the livery or clothing of the company, although he had no reasonable cause to the contrary.

The defendant demurred generally to both counts, and the plaintiffs joined in demurrer.

The cause now came on for argument.

Mr. Serjeant *Taddy*, in support of the demurrer.—The bye-law set out in the declaration, on the breach of which the present action is founded, is not a reasonable bye-law. Although bye-laws for the good order, rule, and government of the company, might have been valid, yet they must be shewn to be agreeable to the custom of the city of *London*, and not contrary to the statutes of the realm, or the letters patent on which they are founded. The mere circumstance of providing a dinner is not necessary for the good order of the society, unless it were incident to the performance of more important duties connected

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with the company, or the individual members forming it; for instance, if they had been convened on matters of business, and detained for a length of time, so as to require sustenance. But the case of the Master and Company of *Frame-work Knitters v. Green* (a), is expressly in point. That was an action of debt for the breach of a bye-law, under letters patent of *Charles* the second, by which the master, wardens, and assistants, were to assemble together annually, upon the feast of St. *John* the Baptist, and choose two persons, members of the corporation, to be stewards for the year ensuing, who, upon the day after the feast of St. *Michael* next ensuing, were to provide a dinner for the master, wardens, and assistants, under the penalty of 10*l.*, or other less sum, to be levied by distress, or recovered by action of debt; and it was objected, (among other exceptions) “That the bye-law itself was ill, because it was not said, that the dinner was appointed to the end that the company should assemble, and consult of things beneficial to the corporation. For it does not appear but that this was only *for luxury*. Then the bye-law is unreasonable, to compel a man to make a dinner only for the luxury of others, without any benefit to himself or the rest of the company. Then, the bye-law being unreasonable, the penalty to perform it is unreasonable also, and consequently not obligatory.” *Quod curia concessit*. And, by the Justices,—“Members of corporations are not bound to perform bye-laws, unless they are reasonable, and the reasonableness of them is examinable by the Judges. Then, this bye-law, to make the dinner, cannot be good in this case of a *new* corporation, because it does not appear to what purpose the dinner is made, and it may be only for good fellowship. But if it had been to make the dinner, to the end that the company might assemble and choose officers, or any other thing for the benefit of the corpora-

(a) 1 Lord Raym. 113.

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tion, it had been well enough. But, in the case of *old* corporations, *by prescription*, a bye-law, to make a customary feast, has been held good." In *Wallis's* case (a), a burgess of *Ipswich* was committed to prison, and upon an *habeas corpus*, the cause was returned, "that the said town was an ancient vill, and that therein was a custom to elect every year two of the burgesses, who are called ———, who used to make a feast upon such a day; and that the defendant, being elected, refused to make that feast; wherefore he was fined 20*l.*, and imprisoned till he paid the fine:" and this was allowed to be a good custom, and well returned; wherefore the prisoner was remanded. So, in *Gee v. Wilden* (b), a bye-law made by the master, wardens, and brotherhood of Tailors in the city of *Litchfield*, that every year, within one month after *Midsummer*, they should choose a master and two wardens, to continue for a year, and that, upon every day of election, there should be a convenient and competent dinner for the master and brothers, and that every one should pay his proportion, was adjudged to be a good bye-law; on the authority of *Wallis's* case. There, however, the bye-law was in aid of a custom; and *Gee v. Wilden* was the case of an *old corporation by prescription*: but here, no such corporation existed, as the company was established and incorporated by letters patent; and there is no allegation of a custom, or that the bye-law for the providing a dinner was necessary for the good order and regulation of the society, but merely for the election or appointment of stewards, who were to provide a dinner for the whole of the livery, at their own costs, on Lord Mayor's day, *with such allowance out of the stock of the company*, or otherwise, as the master, wardens, and assistants, for the time being, should think fit and convenient to be allowed in that behalf.

Besides, the two first counts are defective, in not aver-

(a) Cro. Jac. 555.

(b) 2 Lutw. 1320.

ring what allowance the master and wardens thought fit to make, or that they did not think fit to make any, and that the defendant had notice thereof: neither is it alleged, that, at the time when the dinner ought to have been provided, there was a hall of the company in which it might have been given: nor is it stated, that the defendant was able to provide the dinner, but only that he was summoned to be at the meeting of the company on Lord Mayor's day, to take upon himself the office of one of the stewards.

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Mr. Serjeant *Wilde, contra.*—The bye-law is not unreasonable, nor can it be presumed to be so in the first instance; and, as it appears on the face of the declaration to have been approved of by Lord *Hardwicke*, Lord Chief Justice *Lee*, and Lord Chief Justice *Willes*, three most eminent Judges, every presumption must be made in its favour. It is an established principle, that, if a bye-law be made by a competent authority, every presumption must be made in its favour, and, if it be illegal or void, it is incumbent on a party who is sued for a breach of it to shew it by his plea, or that it is unreasonable and cannot be enforced. The case of the *Frame-work Knitters' Company v. Green*, turned on the assumption, that the dinner was to be provided on a day on which the company had no business to transact; but here the dinner was not to be given for the mere purpose of luxury, but on the day when the Lord Mayor of *London* comes to *Westminster* to be sworn into office; and, as a deputation from each of the city companies always attends him, it must be considered as a day of business, and there is a duty to be performed by the several members of the respective companies, of which the Court may take judicial notice. It was not necessary for the plaintiffs to aver the nature of that duty, or the fatigue or exertion it might occasion. Besides, the stewards were not bound to provide

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a dinner for the whole of the company, but to a limited extent, *viz.* for the livery only; and the penalty for neglecting to do so, is extremely moderate, being confined to 20%. Liverymen should be persons of substance; and it is not unreasonable that three of them, on being elected stewards of the company, should provide an entertainment for the others, on a particular day on which a public duty is to be performed. If a party elect to become a liveryman, he must bear the burthens of the office, which are regulated by usage or custom. The Lord Mayor is always chosen from one of the companies, and the day of his being sworn into office is observed by the whole corporation. In the *Frame-work Knitters' Company v. Green*, the Court said, that, "if the law had been to make a dinner," to the end that the company might assemble and choose officers, or any other thing for the benefit of the corporation, it had been well enough;" and here, it cannot be presumed that no business was to be done on so public a day as Lord Mayor's day. It has been admitted, that, in the case of a corporation *by prescription*, a bye-law to make a customary feast is good; and, in *Wallis's* case, it was established that a bye-law, in aid of a *custom*, imposing such a charge, although without prescription, may be supported. If, therefore, a bye-law of a corporation by prescription, or in aid of a custom, be good, it cannot be deemed bad by the mere fact of its being created or made under or by virtue of letters patent. In *Taverner's* case (a), a bye-law was made by the company of Vintners in *London*, that, for time to come, a certain sum, and no more, should be paid by every liveryman upon his admission, and it was insisted, that this bye-law was unreasonable, and against law, and a grievance to the subject; but the Court resolved that, when a man will agree to be of a company, he thereby submits himself to the laws thereof, and the Court will not take

(a) Sir T. Raym. 446.

notice of any extravagance or charges they lay upon themselves. It therefore follows, that a person who elects to become a member of a public company must submit to its laws; and here the defendant might have enjoyed the benefit of the bye-law, before it came to his turn to be elected a steward and provide a dinner. In the case of the *Master of the Vintners' Company v. Passey* (a), a bye-law directed that every person, on being elected a liveryman, should pay a certain sum on his admission; and on its being objected that it ought to be shewn that the liverymen were persons of substance, and capable of being at the expense of serving or paying the fine, Mr. Justice *Denison* said (b): "Bye-laws ought to have a reasonable construction; we ought not to construe them so strictly as to take them to be void, if every particular reason of making them does not appear. Now, here, it is objected that the person elected may be a beggar, but we can never intend that the company would choose persons not meet and convenient. This is an ancient bye-law, and nothing unreasonable appears upon the face of it." In the case of *The King v. Ashwell*, Lord *Ellenborough* said (c): "In order to avoid a bye-law, upon the ground of its being unreasonable, because of some inconvenience that may result from it, it should appear to be a *probable* inconvenience, for one can hardly predicate of any law, that some *possible* inconvenience may not result from it." In the present state of society, it cannot be deemed unreasonable for a liveryman of one of the public companies in *London* to contribute the sum of 20*l.* on his being elected one of the stewards. At all events, it is matter of defence, and the objection cannot be raised by demurrer in the first instance. But the defendant has not even shewn that the custom relied on is one of probable inconvenience, and it must be presumed to be reasonable, as every intendment must be made in its favour. With respect

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(a) 1 Burr. 235.

(b) Id. 239.

(c) 12 East, 28.

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to the objection, that it is not alleged in the declaration that any allowance was made by the company towards the providing of the dinner, it was altogether unnecessary, as it is averred that the defendant refused to serve or hold his office of steward, and the company could not be called upon to make the allowance, until after the dinner had been provided, or, at all events, until the defendant had accepted the office of steward.

Mr. Serjeant *Taddy*, in reply, was stopped by the Court.—

Lord Chief Justice BEST.—I hope our decision to-day, will not break in upon the entertainment which the citizens of *London* derive from their excellent dinners or feasts; but I am of opinion, that this declaration is bad, for want of an averment, that some offer of allowance had been made by the company to the defendant, towards the expense of providing the dinner:—And I am further of opinion, that the bye-law is bad, as it has every vice that a bye-law can possibly have. It is not reasonable. I admit that a bye-law to make a feast, or give a dinner, may, under particular circumstances, be good; for instance, if it be for the benefit of the corporation, and if they are called together or convened for the purpose of business, it is necessary that they should have some refreshment, and it may be proper for the company to point out the person who shall furnish or provide it. So, a bye-law that a burgess shall make a feast at his election is good, because on such an occasion all the members of the body are called together, and are generally present at the election. In *Wallis's* case, the bye-law was in aid of a custom, and although it might be good, yet the decision is of doubtful authority; for although a corporation may sue for or recover a penalty by action of debt, or by distress, yet they have no remedy by the imprisonment of the party, as appears to have

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been done in that case (a). Here, however, the bye-law cannot be good; as the expense of the dinner is a burthen imposed upon one of the members of the company, for which no sufficient reason is alleged. It is not stated that the company was called together for any purpose of business, and, for any thing that appears to the contrary, it was for mere *luxury*. It is therefore not such a bye-law as the company, by their charter, were authorized to make. They were only empowered by the letters patent of *Henry 7th*, to make reasonable laws for the wholesome rule and government of the company. So, by the 13 *Car. 2*, the master, wardens, &c. were to make such reasonable orders, as to them should seem meet and necessary, as well concerning the oath that should be administered to the master, wardens, and assistants, as also for their good order, rule, and government; and although a dinner might be requisite at a meeting called for the purpose of discussing the duties of the company, as being subject to its good regulation and government; yet it is impossible to say that a dinner, having no reference whatever to business, or connection with the interests of the company, can be justified under a power to make bye-laws for the good order or regulation of the company. Although I was not aware of the case of *The Frame-work Knitters' Company v. Green*, till it was adverted to in the course of the argument, it appears to me to be precisely in point; and though it has been said; that the bye-law in this case had the sanction of Lord *Hardwicke*, and the Chief Justices of the Courts of *King's Bench* and *Common Pleas*, for the time being, yet the bye-law in the case alluded to must have had a similar sanction, as such an authority is absolutely requisite for the establishment of all bye-laws (b). There, the bye-law was for two persons who should be elected stewards of the com-

(a) But see Comyns's Digest, tit. *Bye-law*, E. 1.

(b) See the statute 19 Hen. 7, c. 7.

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pany, to provide a dinner for the master, wardens, and assistants, upon the day after the feast of St. *Michael*, under the penalty of 10*l.*, and it was objected, that the bye-law was ill, because it was not said that the dinner was appointed to the end that the company should assemble and consult of things beneficial to the corporation, for it does not appear but that this was only for *luxury*;—to which the Court agreed, and said that “members of corporations are not bound to perform bye-laws, unless they are reasonable, and the reasonableness of them is examinable by the Judges. Then this bye-law to make the dinner cannot be good in this case of a new corporation, because it does not appear to what purpose the dinner is made, and it may be only for *good fellowship*.” Now, if the bye-law in that case was adjudged to be ill, so must the present, as it is unreasonable, it not appearing that the dinner was to be provided for any business of the company, but only for good fellowship. Besides, it does not appear what allowance was to be made out of the stock of the company, and, as it is left to the discretion of the master and wardens, it is uncertain and defective. But there is a still further objection which appears to me to be fatal to the legality of this bye-law, and which is of no light importance, *viz.* the oath required to be taken, to avoid serving the office of steward. It is highly impolitic that the number of oaths should be increased. It should, on the contrary, be prevented as much as possible, and they should only be administered on grave occasions, and for the purposes of justice. Here, the oath required to be taken is not a judicial oath; and, in order to get rid of the expense of providing a dinner for the mere purpose of luxury, a person who is elected steward must degrade himself by swearing that he is not worth 300*l.*; and if he has only twenty shillings beyond that sum, he is answerable to the penalty of 20*l.* Such an oath compels a cruel disclosure of the circumstances of the party. It is true, that, in many instances, private acts of Parliament

tend to an unfair exposure of the circumstances of some of the parties interested, but here, the oath required to be taken, subjects two persons to the commitment of an illegal act; for the magistrate has no jurisdiction to administer the oath, nor is the party bound, nor ought he, to take it; and if he do, both are guilty of a misdemeanor. Although a person must take an oath that he is not worth 15,000*l.*, in order to excuse himself from serving the office of sheriff of *London*; yet that is an office of trust and responsibility, and is necessary for the purposes of justice. Necessity therefore excuses the taking of such an oath, but it would be too much to extend it to a bye-law, which requires an act to be done, which is neither binding on the party, nor valid in point of law.

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Mr. Justice BURROUSH (a).—It appears to me to be unnecessary to decide whether the oath be binding or not. If it were, I should have desired time to consider that point, as it is not unusual to administer oaths on similar occasions. I own I do not fully agree with my Lord Chief Justice, that the providing a dinner on Lord Mayor's day is to be considered as a mere luxury, for it does not appear to me to be unreasonable that the liverymen of the respective companies should dine together on that day, and here the dinner was to be confined to the livery alone. But I am of opinion that the declaration is bad in substance. The bye-law directs that the dinner should be provided by the stewards, with such allowance out of the stock of the company, or otherwise, as the master, wardens, and assistants for the time being should think fit and convenient to be allowed. The allowance is by the terms of the bye-law in the nature of a condition precedent, for the expense and description of the dinner must mainly depend on the amount of the sum allowed, and there is no allegation that any allowance had been made by the company in respect of the

(a) Mr. Justice *Park* was absent.

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dinner. It is an express condition, which ought to be performed on the part of the company, and the plaintiffs should have averred, either what sum the master and wardens had thought fit to allow, or that they had offered to pay it to the defendant, before they could call on him to provide the dinner.

Mr. Justice GASLIER.—I also think that the declaration is bad, the plaintiffs not having averred that some allowance had been made or offered to the defendant by the master and wardens of the company. By the bye-law, the stewards who were to provide the dinner, were to have some allowance for so doing out of the stock of the company, and they could not know how to provide, unless they knew the amount of the sum allowed, and which should have been tendered to the defendant, and the fact alleged in the declaration. On the bye-law itself, I abstain from giving any opinion. I do not know that we are bound to take judicial notice of the proceedings on Lord Mayor's day, or that the respective companies are obliged to attend him on his being sworn in at *Westminster-Hall*. Several of the companies accompany him in their barges, whilst others join him in the cavalcade, in the streets, and it seems that a dinner is provided by every company on that day. At all events, it might have been averred, that the company to which the defendant belonged assembled on business on that day, and that the dinner was provided in consequence. Besides, the bye-law, as set out in the declaration, does not except those members of the company who had before served the office of steward, and a person might be elected to serve as such every year. But the ground on which I rely is, the want of the allegation of the allowance by the company, for the purpose of enabling the stewards to provide the dinner; and I give no opinion as to whether the magistrate has jurisdiction to administer the oath required to be taken by a party who wishes to relieve himself from the payments and penalties imposed by the bye-law, or whe-

that some other mode might and ought not to be resorted to, to avoid the necessity of taking such an oath.

Judgment for the defendant.

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KYMER and Others, Assignees of O'BRIEN, Bankrupt,
v. LARKIN and Another.

Thursday,
June 19th.

THIS was an action of *assumpsit*, brought by the plaintiffs, as assignees of *John O'Brien*, a bankrupt, to recover a sum of money from the defendants as money had and received to the use of the bankrupt before his bankruptcy, or to the use of the plaintiffs, as his assignees, after the bankruptcy.

The declaration contained the usual money counts. The defendants pleaded the general issue.

At the trial, before Mr. Justice *Park*, at the Sittings at *Guildhall*, before *Michaelmas* Term, 1822, a verdict was taken for the plaintiffs for 512*l.*, subject to the opinion of the Court upon the following case, with liberty to either party (if the Court should approve thereof) to turn it into a special verdict.

The plaintiffs were assignees duly chosen under a commission of bankrupt, which issued against *John O'Brien* on the 11th *October*, 1819, and under which he was declared a bankrupt.

The defendants were, on or before the 15th *June*, 1818, owners of the ship called the *Lord Cawdor*, whereof *John Brooks* was master; and, on or after that day, the said *John Brooks*, as agent for the defendants, entered into a charter-party with *O'Brien* for the said ship, which was duly executed, and a copy of which accompanied the case.

The master of a ship, as agent for the owners, entered into a charter-party with the freighter to take a cargo from *London* to *Port-au-Prince*, and to receive a homeward cargo from the freighter's agents there. Previously to the ship's arrival, the outward cargo was assigned by the freighter to Messrs. *C. & B.* as a security for advances made and to be made by them. The freight of the outward cargo not having been paid, the master attached the goods whilst in the hands of the bankrupt's agents, under the judgment of the Court at *Port-au-Prince*; and the agents having declined to supply a homeward cargo, the master put up the

vessel as a general ship, and procured a return cargo for his owners, who received the freight on the ship's arrival at *London*. The freighter having become bankrupt subsequently to the assignment to Messrs. *C. & B.*:—*Held*, that his assignees could not recover the proceeds of the outward cargo or the freight earned on the homeward voyage, in an action for money had and received.

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The bankrupt loaded the ship under the charter-party, with a full loading of his own goods, consigned to the bankrupt's agent, Mr. *Robert Sutherland*, at *Port-au-Prince*, for sale, and the captain arrived at *Port-au-Prince* on or about the 9th *August*, 1818, and delivered the goods to the said Mr. *Sutherland* there.

On the 20th *February*, 1819, the bankrupt, in consequence of monies which had been advanced to him by Messrs. *Campbell & Bowden*, and in consideration of further advances agreed to be made by them to him, assigned by deed to Messrs *Campbell & Bowden* the goods so consigned to *Sutherland*, and also another cargo of the bankrupt's, which had been consigned by him to *Sutherland* for sale, by a ship called the *Olive Branch*, as a security for the repayment of such advances; and by the deed of assignment last mentioned, the bankrupt and the said Messrs. *Campbell & Bowden* constituted and appointed Mr. *Henry Wylie*, then in *London*, and about to proceed to *Port-au-Prince*, and Messrs. *Surreau & Co.* of *Port-au-Prince*, the attornies of the bankrupt and of Messrs. *Campbell & Bowden*, to receive and recover from *Sutherland* the said cargoes, and the proceeds thereof, and to act for them generally in their affairs relating to the charter-party.

Sutherland died at *Port-au-Prince*; but, before his death, Messrs. *Surreau & Co.* obtained a transfer of the goods, which had arrived in the *Lord Cawdor*, from the warehouses of *Sutherland* into their own warehouses, under and by virtue of the said assignment and power of attorney.

Shortly after the arrival of the *Lord Cawdor* at *Port-au-Prince*, *Sutherland*, as the agent and consignee of the bankrupt, advanced to captain *Brooks*, on account of the ship, the sum of 204*l.* 6*s.* Neither *Sutherland* nor Mr. *Wylie*, nor the said Messrs. *Surreau & Co.*, did or would procure any return cargo for the ship at *Port-au-Prince*, pursuant to the terms of the charter-party. On

the ship's clearing at the custom-house in *London*, the bankrupt accepted a bill drawn by the defendants, according to the terms of the charter-party, at two months, for 368*l.* on account of freight, which bill was paid when due. On the 17th *December*, 1818, the defendants drew another bill for 366*l.* 15*s.* 3*d.* on further account of freight; the bankrupt accepted this bill, but it was dishonoured when due, and is still unpaid.

The master, *John Brooks*, on the 22d *May*, 1819, wrote a letter to the bankrupt, as follows:

“ *John O'Brien*, Esq.

Sir—I have to acquaint you of the death of Mr. *Robert Sutherland*, and also of Mr. *Francis Smith's* departure from hence, whom, I make no doubt, you will see in *London* before this comes to hand.

“ I am sorry to say that Messrs. *Surreau & Co.* will not have any thing to do with the vessel, although they sent for me on the 9th *March* and acquainted me with the transfer of your property over to Messrs. *Campbell & Bowden*, and it was their intention to expedite the vessel as quick as possible for *Rotterdam*. Since the death of Mr. *Sutherland*, and the arrival of Mr. *Wylie*, they have altered their intentions and left me to shift for myself, and, the inward duties of my cargo not being paid, have left me and my vessel and crew in a very awkward situation. Chartered as the *Lord Cawdor* was, kept me from acting in any manner for you, and your agents had the liberty of keeping the vessel as long as you pleased.

“ The President not being in town, I can say nothing respecting the vessel. Should I be able to get her released, I shall put her up as a general ship for *London*, on your account. I cannot but express my surprise at the manner Messrs. *Surreau & Co.* have acted. They, as well as Mr. *Sutherland*, had given me their word that the vessel should be dispatched from *Jaquinell* by the 10th instant; I have made it my business to call on Mr. *Wylie* twice, but he

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says he has nothing to do with either you or the vessel, which will make me act as my duty towards my owners and you require. Wishing that this unfortunate affair may turn out better than expected.—I am, your obedient servant,

John Brooks.

“Brig *Lord Cawdor*, *Port-au-Prince*,
May 22, 1819.”

On the day previous to this letter, viz. on the 21st May, captain *Brooks* attached the goods which had been carried out of the ship *Lord Cawdor* at *Port-au-Prince* in the hands of Messrs. *Surreau & Co.*, in an action instituted against the bankrupt there to recover the sum of 1,109*l.* 19*s.* 6*d.* for eleven months' freight of the *Lord Cawdor*, at the rate specified in the charter-party, with primage and gratuity (after giving credit for the acceptances of the bankrupt, and for the sum of 204*l.* 6*s.* paid to the captain by Mr. *Sutherland*), and also to recover a penalty of 1,000*l.* mentioned in the charter-party.

On the 24th June, 1819, Captain *Brooks*, who had expressed his intention to put up the ship as a general ship for *O'Brien*, the bankrupt, if he got her released, and whilst the proceedings were going on, received a letter from Mr. *Wylie*, the agent of *O'Brien*, stating that he had no cargo to put on board his vessel for *O'Brien*, or on any other account, as follows:—

“Sir—I think it a duty I owe Mr. *John O'Brien* of *London*, as his agent here, as well as yourself, to state I have no cargo to put on board your vessel for his, or on any other account, nor has he any other agent here that I know of.—Your most obedient Servant,

Henry Wylie.

Addressed to Captain *John Brooks*, *Lord Cawdor*,
Port-au-Prince.”

Upon the proceedings instituted at *Port-au-Prince*, the defendants' agents recovered from Messrs. *Surreau &*

Co. £,182*l.*; but they only remitted to the defendants 1,757*l.* 3*s.* 9*d.*, having deducted and retained their commission; and also deducted and retained 336*l.* 19*s.* 3*d.* for law charges.

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In the month of *July*, 1819, Captain *Brooks* loaded the ship *Lord Cawdor* with goods at *Port-au-Prince* on freight for *London*, where she arrived with and discharged the last-mentioned goods on the 17th *October* following; and the defendants received for the freight of those goods the sum of 779*l.* 9*d.*, but from that sum they were entitled to deduct, for lighterage and commission, 107*l.* 9*s.* 6*d.*, leaving a net balance of 671*l.* 11*s.* 3*d.*

The freight of the *Lord Cawdor*, according to the terms of the charter-party, from the 17th *June*, 1818, to the 17th *October*, 1819, amounted to . . . £2,666 17 4

Ten per cent. primage, . . . 266 13 8

Total, . . . £2,933 11 0

The freight, up to the time of the attachment, with primage and gratuity, amounted to 2,044*l.* 2*s.* 10*d.*

By the charter-party, *Brooks*, as agent for the defendants, let the *Lord Cawdor* for freight to *O'Brien* for six months certain, or such longer period as he might think proper to employ her for the voyage. The master was to take on board all such goods and merchandizes as should be tendered to him by the freighter at *London*, and sail from thence, and proceed to such port or ports in the *West Indies* as the freighter should order and appoint, and, on arrival, give notice to the agents of the freighter; and deliver the cargo from along-side according to bills of lading, and then to receive on board such goods as the agents or assignees of the freighter should tender, and sail to a port in the channel for orders, and thence to *London*, or a port on the continent. The master was not to take on board any goods during the voyage, other than from the freighter

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or his agents. The freighter covenanted to put goods on board, to dispatch the ship from *London* to the *West Indies*, to unship the cargo there, and procure another for *Europe*, to dispatch the ship home to *Europe*, to unload her on her arrival, and to pay freight at the rate of twenty-one shillings *per month per ton* of register tonnage, for six months certain, and so on, in proportion, for any longer time she might be employed in the voyage, to commence from *June 17th, 1818*, and continue until her final discharge in *London*, or such port on the continent as should be agreed upon; and the freight was to be paid to the owners as follows, *viz.* two months' pay with ten *per cent.* thereon on the ship's clearing at the *Custom House* in *London*, by bill at two months; and, after six calendar months from the date of the charter-party, a similar bill at two months, and the remainder of the freight, &c., on the final discharge of the ship, in cash. Both parties, for the due performance of their respective covenants, bound, the master the ship, and the freighter the goods, in the penal sum of 1,000*l.*

By the proceedings in the suit instituted at *Port-au-Prince*, it appeared, that, on the petition of *Brooks*, the Court gave judgment against *O'Brien*, "a foreigner absent, in default," for 10,545 dollars for freight of the brig *Lord Cawdor*. That, upon this judgment, the cargo was attached as *O'Brien's*, in the hands of *Surreau & Co.*, who then alleged that they had no property of *O'Brien's*, the whole cargo having been previously assigned by him to Messrs. *Campbell & Bowden* for a debt due from him to them, and that *Surreau & Co.* were agents for *Campbell & Bowden*; that *Wylie*, and *Surreau & Co.*, as agents for *O'Brien*, and Messrs. *Campbell & Bowden*, then came in to protect the goods, and appealed to the Supreme Court, in which the judgment of the Court below was affirmed, after a full investigation of the merits of the case on behalf of all parties.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover back all or any

of the money so received by the defendants. If the Court should be of opinion that they were so entitled, the verdict was to stand for such sum as the Court should direct; but, if the Court should be of opinion that the plaintiffs were not entitled to recover any thing, a nonsuit was to be entered, subject in either case to the liberty reserved as to a special verdict.

The case now came on for argument, when—

Mr. Serjeant *Taddy*, for the plaintiffs, submitted, that two questions arose for the consideration of the Court—*First*, whether the plaintiffs were entitled to recover the proceeds of the outward cargo shipped by *O'Brien*, the bankrupt, under the charter-party, which proceeds, and also the amount of the penalty of the charter-party, the defendants, by their agents at *Hayti*, received under the attachment and judgment thereon procured by them from the Court there;—and *secondly*, whether the plaintiffs could recover the proceeds of the homeward cargo, which the defendants had also received.

First, the goods shipped by the bankrupt under the charter-party belonged to him. He was, consequently, entitled to the produce after they arrived at *Port-au-Prince*, and the master, as the agent of the defendants, had no authority to cause them to be seized or attached there, either for the freight or advances that might have been made on account of the ship, or for the penalty in the charter-party. Although the defendants might have been entitled to the freight due under the charter-party, still the captain was not authorized to seize or attach the goods, and the seizure is, at all events, illegal. The only ground on which it can be justified is, that, by the maritime law, a greater effect is given to the general clause of penalty at the end of a charter-party than by the law of *England*; but even this would not justify any Court in giving both the freight and penalty, which the Court at *Hayti* did. But that Court had

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no jurisdiction, as the charter-party was made and executed in this country by British subjects, who were also resident here; and, although the voyage was from London to the West Indies, yet it was to be completed at London, and, therefore, the law of England alone can take cognizance of such a contract. At all events, if a foreign Court had jurisdiction, it is merely intermediate or ancillary to our law, and more particularly where the subject-matter of the contract had its commencement and was to end here. In *Henry's Foreign Law* (a), it is said, that, "Perhaps no rule in the civil law has been more implicitly followed, and yet occasioned greater perplexity, than the celebrated one, '*Contraxisse unusquisque in eo loco intelligitur in quo ut solvet et se obligavit*' (b)." This perplexity and confusion has also not a little been increased by another text of the Roman Law, under the title of guaranty, warranty, or eviction:—"Si fundus venierit, ex conventionibus ejus regionis in qua negotium gestum est cavere oportet (c)." Although it may be said, that, the vessel being at Port-au-Prince, and the proceeding being *in rem*, the Court of Hayti had jurisdiction over the subject-matter, as that state has adopted the *Code Napoleon*, which gives the master of a vessel a greater authority than the law of this country; still, the freight was not payable, although it might have been earned; and, therefore, the Court abroad, although they might have a limited jurisdiction, exceeded it by condemning the cargo for the payment of the freight, as well as the penalty in the charter-party.

Secondly,—The plaintiffs were, at all events, entitled to recover the sum earned for freight on the homeward voyage. Although the bankrupt had no cargo to put on board at Port-au-Prince, the master ought either to have

(a) Page 42.

(c) Digest, de Evictionibus, 21,

(b) Digest, de Obligat. et Act. 22.

l. 44, 67, 621.

come home in ballast, or put up the ship for freight on account of the plaintiffs. But the defendants' contract with the bankrupt was not repudiated, and the homeward cargo was put on board and to be conveyed on his responsibility. He had covenanted to pay at the rate of one guinea per month per ton, for any time the vessel might be employed in the voyage, until her final discharge at London. He, therefore, had a right to the use of the vessel as long as he pleased. Besides, it is expressly stipulated by the charter-party, that the master was not to take any goods on board during the voyage except from the freighter or his agents; and, as he has done so, it must be taken that they were conveyed for O'Brien, the freighter, and, therefore, the plaintiffs, who now represent him, are entitled to recover such freight.

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Mr. Serjeant *Wilde, contra.*—This action cannot be maintained. Long before the goods were attached under the process of the Court at Hayti, they had ceased to be the property of O'Brien, the bankrupt, as he had assigned all his interest in the outward cargo to Messrs. *Campbell & Bowden*, in consideration of advances made by them, and they were parties to the suit, and appealed from the inferior to the Supreme Court, in which the judgment below was confirmed. It is not, therefore, material to consider whether the Court at Hayti had jurisdiction or not. But the seizure and attachment were legal. The bankrupt's agent informed the master that he had no return cargo to provide, and he was also aware of the embarrassed circumstances of O'Brien. The captain had a larger lien on the cargo by the law of Hayti, than by the law of this country. He applied to the Court there to protect him, and he had a right to pursue his remedy there. The case of *Grant v. Hill* (a) is decisive to shew that the plaintiffs are

(a) 4 Taunt. 380.

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entitled to recover in an action for money had and received, as the goods attached were not the property of the bankrupt at the time the defendants received the amount of the freight, to which they were clearly entitled by virtue of the proceedings in the Court at *Hayti*; and, although it has been said, that that Court had no jurisdiction, yet they had a right to proceed when they had all the parties and the goods themselves before them; and it is not stated in the case, nor can the Court take notice, what the law of *Hayti* is upon this subject; for, as was said by Lord Chief Justice *Eyre*, in *Phillips v. Hunter* (a): “If we had the means, we could not examine a judgment of a foreign Court in a foreign state: it is in one way only, that the sentence or judgment of the Court of a foreign state is examinable in our Courts, and that is, when the party who claims the benefit of it, applies to our Courts to enforce it.” Now his Lordship was there treating of a judgment obtained under an attachment in a Court abroad. Here, the defendants had not only a right to the freight, but also to the penalty stipulated to be paid by the charter-party for the breach of covenant in not providing a return cargo; and they do not seek to enforce the judgment, but to retain the sum they have received under it, and which they were clearly entitled to claim, it being founded on a *bond fide* and valid consideration.—With respect to the homeward freight, the plaintiffs cannot be entitled to recover that, as the agent of the bankrupt refused to load a return cargo, according to the terms of the charter-party. The captain, therefore, was perfectly justified in procuring a homeward cargo for the defendants, as his owners. The learned Serjeant was proceeding with his argument, when—

The Court called on Mr. Serjeant *Taddy* to answer the

(a, 2 H. Blac. 410.

objection as to the effect of the assignment by *O'Brien* to Messrs. *Campbell & Bowden*, previously to the attachment or proceedings in the Court at *Hayti*.

The learned Serjeant submitted that the assignment was merely to operate as a security, and did not convey the absolute interest *O'Brien* had in the goods, as it was found as a fact that it was only in consideration of advances made, and *to be made*. It may, therefore, be assimilated to a security by way of mortgage; and *Wylie* and *Surreau & Co.* were appointed attornies for *O'Brien* and *Campbell & Bowden* jointly, and for securing the interests of both parties. For any thing that appears to the contrary, the advances might have been repaid. Besides, the plaintiffs do not claim the goods, but seek to recover back the money which was illegally obtained from *O'Brien*; and the defendants, having received it, are estopped from saying that the money belonged to any other person than him; and, having acknowledged to have procured it from the bankrupt, they must account for it to the plaintiffs, as his assignees. There is a wide distinction between an action of trover, and an action for money had and received; for, in the latter, if a person receive money as the property of a third party, he must account to him for it, although the actual property might belong to another.—As to the homeward freight, the plaintiffs are clearly entitled to recover its amount, as there was no repudiation or abandonment of the charter-party by the bankrupt or his agents at *Port-au-Prince*. *Wylie*, by his letter of the 24th *June*, merely stated that he had no cargo to put on board, and that would be no answer to an action of covenant on the charter-party, which, being under seal, could only be discharged by deed. Besides, the mere omission to provide a homeward cargo, or reload the ship, would only entitle the defendants to damages; for, in *Abbott on Shipping*, it is said (a), that, where a case does not stand upon a general

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(a) 4th Edit. 212.

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covenant to load a ship, but the parties had fixed a sum to be paid in the event of the merchant's not loading, the proper remedy for breach of such a covenant, according to the law of *England*, would be an action for damages. And, although a ship may come home in ballast, it will not have the effect of avoiding the charter-party; nor could the defendants, under the circumstances, load a return cargo, so as to entitle themselves to freight on the homeward voyage.

Lord Chief Justice BEST.—I am very glad to be relieved from deciding the question upon the law of nations, for, although Courts in this country are, in some cases, bound to take judicial notice of proceedings in Courts abroad, yet our attention is not frequently called to them; but here, the plaintiffs are not entitled to recover by our own law. The first question raised in the argument was, whether the plaintiffs can recover the proceeds of the outward cargo, which was attached at *Port-au-Prince*. I am clearly of opinion that they cannot, because it is stated, and found as a fact in the case, that, on the 20th *February*, 1819, *O'Brien*, the bankrupt, in consideration of advances made and to be made by Messrs. *Campbell & Bowden*, assigned to them, by deed, the goods in question, together with the cargo of another vessel also consigned to *Sutherland*; and both parties, by the same instrument, appointed *Wylie*, who was about to proceed to *Port-au-Prince*, their attorney, and authorized him to act for them there. Besides, the assignment was made several months previously to the bankruptcy, and for a valuable consideration, and the plaintiffs must stand in the same situation as the bankrupt himself. To whom, then, in law does this property belong? To *Campbell & Bowden*, as assignees, under the deed. The bankrupt could have brought no action for the property, or for its value or produce, without defeating the object and effect of that deed, and impeaching the

validity of his own assignment. It is, therefore, unnecessary to consider whether the proceedings at *Port-au-Prince* are valid or not, although I am most strongly inclined to think that they are not.—With respect to the second question, as to whether the plaintiffs are entitled to recover the amount of the freight earned on the homeward voyage, although it must be admitted, that, generally speaking, an obligation by deed can only be got rid of or remitted by deed; yet, after what has taken place, it is impossible to say that the plaintiffs can be entitled to the proceeds of the homeward freight. The return cargo was not brought home on the account of the bankrupt, nor was it put on board until after his agent had rejected all interest in the vessel. The captain having expressed his intention to put up the ship as a general ship for the bankrupt, if he got her released, received a letter from *Wylie*, the agent of *O'Brien*, who said, that he thought it was a duty he owed to him as well as the captain to state, that he had no cargo to put on board the vessel for *O'Brien*, or on any other account, nor had he any other agent there. Under such circumstances, what was the captain to do? He must either have gone home in ballast, or taken in a cargo from some third party. If he had adopted the former course, his owners would have had a right of action against *O'Brien*; but, after his agent had refused to procure a cargo, the captain loaded the ship with goods on freight for the benefit of his owners, and it turned out that he was wise in so doing, as *O'Brien* had become bankrupt. Yet it has been said that this did not get rid of the charter-party; but, at all events, the cargo was not brought home for the bankrupt or on his account; and, if the plaintiffs, as his assignees, had sued the defendants upon the charter-party for not bringing home a cargo, the answer would have been, that the ship was ready, but that the defendants' agent had no goods to put on board. The charterer, therefore, has not complied with the terms of the charter-party, but in fact

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repudiated it, as, when his agent informed the captain that he had no cargo to provide, he thereby abandoned the ship. I am therefore of opinion, that there is no foundation for either of the claims set up by the plaintiffs. My brother *Park* and my brother *Gaselee*, who are obliged to be absent, have desired me to express their perfect concurrence.

Mr. Justice BURROUGH.—This is an action for money had and received, and brought by the assignees of a bankrupt, who had chartered a vessel from *London* to the *West Indies*, and in which they seek to recover the proceeds of the freight of the outward and homeward cargoes. It appears to me to be impossible to say, that, under the circumstances, they can be entitled to demand either. With respect to the latter, the agent of the charterer had abandoned the charter-party, by stating that he had no cargo to put on board, and the captain was right in taking in other goods, which were not received on account of the bankrupt, or for his use, but for the benefit of his owners; and, as to the freight of the outward cargo, the plaintiffs cannot be entitled to recover, as there had been an actual assignment by *O'Brien* by deed, previously to his bankruptcy, and before any proceedings were taken under the attachment.

Postea to the defendants.

FURNESS, Assignee of GODDARD and others, Bankrupts,
v. COPE.

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Friday,
June 20th.

THIS was an action of *assumpsit*, and brought by the plaintiff as assignee of *Goddard*, and two others, bankrupts, to recover the sum of 60*l.* alleged to have been paid by one of the bankrupts to the defendant in contemplation of bankruptcy, and by way of fraudulent preference. The declaration contained two sets of counts, the one for money lent, money paid, money had and received, and on an account stated, in which the promises were laid to have been made by the defendant to the three bankrupts, jointly, before their bankruptcy; and the last set of counts was for money had and received, and on an account stated, with promises to the plaintiff, as assignee. Plea—The general issue.

A banker's ledger is admissible in evidence to shew that a customer had no funds in their hands on a particular day, although entries were made therein by several of the clerks of the house.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, in order to shew that the bankrupts must have contemplated bankruptcy at the time of the payment in question, as well as the state of their affairs previously thereto, the plaintiff produced (among other evidence) the ledger of the bankers with whom the bankrupts kept an account, when one of the bankers' clerks stated that the entries in the ledger were made by various persons, and some of them by the members of the firm, and that all the clerks in the house referred to the book in order to ascertain whether the parties who kept cash there had sufficient funds to meet their checks, when they were presented for payment. It further appeared by the ledger, that, on the 2nd *June*, 1825, the bankrupts had a balance at their bankers', amounting to 470*l.* 19*s.* 3*d.*; that on that day one of the bankrupts drew out 400*l.*, with which he absconded, and that on the 4th *June*, another of the bankrupts drew out 70*l.*, in two checks, one of which, for 60*l.* (the sum in question), he paid to the defendant, leaving a balance of 19*s.* 3*d.* only.

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For the defendant, it was objected, that the ledger ought not to have been received, as it was not the best evidence against the defendant, as the bankers themselves, or at all events the clerks who made the entries, as far as they regarded the bankrupts' account, ought to have been called. His Lordship, however, over-ruled the objection, and the Jury found a verdict for the plaintiff.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted; on the grounds—*First*, that there was no evidence that the payment in question was made with a view to a fraudulent preference;—*Secondly*, that the ledger had been improperly received in evidence;—and *Lastly*, that the declaration could not be supported, as the promises were laid to have been made to the three bankrupts jointly, and there was only evidence to shew that one of them had committed an act of bankruptcy, and that it did not appear that the party who made the payment to the defendant knew that one of his partners had committed such an act, or that he had absconded.

Mr. Serjeant *Merewether* now shewed cause. *First*, there was abundant evidence to shew that the payment in question was made by the bankrupt to the defendant with a view to a fraudulent preference, but the question was most fairly and fully left to the Jury, and their verdict is decisive and cannot be disturbed. *Secondly*, the ledger, as well as the books of the bankers, were properly received in evidence for the purpose of shewing the state of the bankrupts' account shortly before the bankruptcy, and at the time the payment was made to the defendant. All the principal events, as well as the days of payment, and amount of the sums drawn on the banking-house, were entered in the ledger, which was accessible to all the clerks, for the purpose of shewing whether the customers kept

such an account, or had a sufficient balance in the house, to warrant the payment of checks drawn day by day. It was impossible for the clerks to speak to transactions of that nature from memory, and there is no ground for saying that any of the entries were false, or made with a fraudulent view, as the books were kept in a public manner, and were therefore free from all suspicion. Although it is an established rule, where the nature of the case admits of it, that the best evidence must be produced, yet the admissibility of books of this description is an exception in favour of trade and commercial interest. Although there is no decision in point, yet in *Price v. The Earl of Torrington* (a), where the plaintiff, a brewer, proved that the usual course of his dealings was, that the draymen should come every night to the clerk of the brewhouse and give him an account of the beer delivered out by them, which he set down in a book kept for that purpose, and the draymen signed it;—a drayman who had signed a particular entry, but had since died, and his hand-writing was proved, such entry was held to be good evidence of the delivery of beer for which the action was brought. Although there the party who made the entry had died previously to the trial, yet here the ledger was admissible from the necessity of the case; and it was not necessary to call all the members or clerks in the house to prove a negative; and whether the bankrupt had money there or not at the time the payment in question was made, could only be ascertained by the production of the ledger. The learned Serjeant was about to proceed with his argument, in answer to the last objection, when he was stopped by the Court.

Lord Chief Justice BEST.—I am of opinion that the ledger was properly received in evidence for the purpose of shewing the state of the bankrupts' account previously

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(a) 1 Salk. 285. S. C. Holt's Rep. 300.

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to the bankruptcy, and at the time the payment to the defendant was made. The greatest mischief would follow, if we were to hold otherwise. Whether the bankrupts had any funds in the hands of their bankers could not be proved by any other evidence, and it would be most inconvenient to require the partners and every clerk in the establishment to prove that fact; and even if they were called, they would not be enabled to speak to a transaction of this nature of their own knowledge. They could only refresh their memory by reference to the ledger, and to which they constantly referred, to see whether the parties keeping cash at the house had sufficient to meet their checks as they were presented for payment. If the book had been called for to prove the payment of money into the bank, the rule would have been different, but here it was used for the purpose of proving a negative, *viz.* that the bankrupts had no money there; and they must have been conscious of that fact at the time of the bankruptcy. With respect to the last objection as to the insufficiency of the declaration, the evidence as to the acts of bankruptcy was not clear; and I am of opinion the question deserves further inquiry, and on that ground I think there ought to be a new trial.

Mr. Justice PARK.—I am also of opinion that the ledger was properly received in evidence to prove the fact for which it was produced, *viz.* that the bankrupts had no funds at their bankers' on a particular day. Books may be admitted for the purpose of proving some transactions although not others. But when a particular fact cannot be ascertained without reference to a book, it may be received, as here, and more particularly, as it was open to all the clerks in the house, and they had constant access to it, to see whether the customers had sufficient money in the hands of the bankers to meet their checks which were presented from day to day. Books of a public prison are ad-

missible to prove the time of a prisoner's discharge or commitment, but not to prove the cause of such commitment or of his detention. As to whether the declaration was supported by the evidence, or whether the payment in question was made with a view to a fraudulent preference, I abstain from giving any opinion.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring, the rule for a new trial was made—

Absolute.

JACOBS, Assignee of LAWTON, a Bankrupt, v. LATOUR, Esq. and MESSER.

Wednesday,
June 25th.

THIS was an action of trover for divers horses, mares, and geldings, alleged to be the property of the bankrupt, and converted by the defendants to their own use.

At the trial, before Mr. Justice *Burrough*, at the last Assizes at *Hertford*, it appeared that the horses, which belonged to the bankrupt, had been left by him with the defendant *Messer*, a stable keeper and occupier of land, for the purpose of being trained for racing. That *Lawton* being indebted to *Messer* in a large sum for his services, as well as for the keep of the horses, and being insolvent, *Messer*, in *Easter Term*, 1827, obtained a judgment against him for 227*l.*, and sued out a *fieri facias* thereon, under which the horses in question were seized by the defendant *Latour*, as Sheriff of *Hertfordshire*, on the 16th *May*, 1827, they being then in the stables of *Messer*, and were valued and sold to him, under the execution, for 156*l.* It also appeared, that a commission of bankruptcy issued against *Lawton* on the 22d *May*, 1827, founded on an act of bankruptcy committed by him on the 7th *February*, 1825, by virtue of which the plaintiff, as his assignee,

If a party having a lien on goods, causes them to be taken in execution at his own suit, he thereby destroys his right of lien, although the goods were never removed from his premises.

A trainer of race horses has a lien on them for his charges for exercising and training.

An objection to the sufficiency of depositions to establish an act of bankruptcy must be made at the trial.

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commenced this action to recover the value of the horses so sold.

For the defendants, it was insisted, that, although the execution might not be available, the act of bankruptcy having been committed previously to the levy, still that the action could not be maintained, as the defendant *Messer* had a lien on the horses for his services in training them, independently of their keep; and that he was, at all events, entitled to detain them until the sum due from the bankrupt in respect thereof had been paid, and which far exceeded the value of the horses sold under the execution. The Jury, however, found a verdict for the plaintiff, leave being reserved the defendants to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that the objection was well founded.

Mr. Serjeant *Wilde*, in the last Term accordingly obtained a rule *nisi*, and contended,—*First*, that the action was not maintainable against the defendant *Latour* as sheriff, as the whole transaction relating to the levy was completed before the commission issued; the property was not only valued and delivered to *Messer*, but the execution was actually executed before the sheriff had any knowledge of an act of bankruptcy having been previously committed by *Lawton*, and the commission was not issued till a week after the sale.

[The Court referred to the case of *Price v. Helyar* (a) as being conclusive to shew, that, if a sheriff levy under an execution after an act of bankruptcy committed by the party against whom the execution is sued out, the sheriff is liable to the assignees in an action of trover, although he had no notice of the act of bankruptcy, and the goods seized were not removed from the premises, but only detained till the amount directed to be levied was paid by the bank-

(a) 1 Moore & Payne, 541; S. C. 4 Bing. 597.

rupt to the sheriff; and the commission did not issue till nearly two months after the seizure.]

Secondly, as the defendant *Messer* was a trainer, and the horses were left with him for the purpose of being exercised and trained for racing, he had a lien on them independently of their keep, and he was to receive a remuneration accordingly. In *Chase v. Westmore* (a), it was decided, that a workman having bestowed his labour upon a chattel, in consideration of price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid. *Lastly*, there was not sufficient evidence that *Lawton* had committed an act of bankruptcy; for, although the depositions taken before the commissioners were put in, yet the only proof of the act of bankruptcy was by the bankrupt himself; and, although the statute 6 Geo. 4, c. 16, s. 92, enacts, that depositions are to be conclusive, unless the commission be disputed; yet, as there was no legal evidence of the act of bankruptcy, the deposition of the bankrupt alone as to that fact ought not to have been received or considered as conclusive.

The Court said, that, as the depositions were used, and no objection was taken at the trial, it was too late to raise it now, and more particularly so, as, if it had been then done, additional evidence might have been adduced to establish the act of bankruptcy.

The rule, therefore, was granted on the *second* point only.

Mr. Serjeant *Andrews* now shewed cause.—The only question is, whether the defendant, a trainer, has a lien on race horses, for his charges in keeping and training them, they having been left with him for the latter purpose. The case of *Chase v. Westmore* does not apply, as there, wheat was delivered to the defendants, who were millers, to be ground, and it was stipulated that it was to

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(a) 5 Mau. & Selw. 180.

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be returned when ground, and the amount of the price of grinding was fixed by express agreement between the parties. Here, however, the defendant *Messer*, is not to be considered as an inn-keeper, or a person exercising a trade, but a mere livery-stable keeper, and, as such, has no lien for the keep of horses left with him, as the owner may either ride them, or take them away when he pleases. In *Chapman v. Allen* (a), it was held, that, if a person receive horses or cattle to agist, paying a weekly sum for them, they cannot be detained until such sum be paid, unless there be a special agreement between the parties. The horses were sent to *Messer* for the sole purpose of being trained, and in *Jones v. Pearle* (b), it was held, that an inn-keeper cannot sell a horse left with him, to satisfy a sum due for his keep. But, even if *Messer* had a lien on the horses, it was waived by his having taken them under the execution, which was sued out at his own instance, and without reference to his lien, and he became re-possessioned of them by virtue of the sale made to him by the sheriff.

Mr. Serjeant *Wilde*, in support of his rule.—The defendant *Messer* exercised the calling or employment of a trainer of horses, he therefore cannot be considered in the light of a livery-stable keeper, or inn-keeper. The training of horses for running at races requires a considerable degree of skill, and cannot be assimilated to a case where they are left for the mere purpose of being provided with food or agistment. A horse at livery may be used by his owner as occasion may require, and he is left there subject to the control of his master, but a horse is not fit to be entered to run a race until he has undergone a regular course of training; and the trainer is obliged to exercise a great degree of skill, to get him into proper paces, and bring

(a) Cro. Car. 271.

(b) 1 Str. 556.

him into condition. He, therefore, may be assimilated to a bailee who expends labour and skill in the improvement of the article delivered to him, and who has a right of lien until his charges for such labour be paid. If a dog be trained for sporting, the person who breaks him in, is entitled to detain him till he is remunerated for his labour, and the keep of the animal is a very trifling part of the expense. Although it has been said, that the seizure under the execution was a waiver of the prior right of lien, yet that objection cannot avail, as the horses were never removed from *Messer's* premises, but were only valued to him by the sheriff; and the amount of such valuation was much less than was due from the bankrupt for their keep and charges for training. Though the act of bankruptcy, being prior to the levy, might operate to defeat the execution, still the defendant *Messer* was remitted to his original right of lien; and the mere valuation by the sheriff could not have the effect of destroying that right. As, therefore, there was no change of property, the only effect of the levy was to make the defendant's lien more effectual and secure.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court, as follows:—This was an action of trover, brought by the plaintiff, as assignee of *Lawton*, a bankrupt, against the defendant *Latour*, as Sheriff of *Hertfordshire*, and *Messer*, a horse keeper and trainer, to recover the value of certain horses left with *Messer* by the bankrupt, for the purpose of being trained for racing. Two questions have been raised,—*First*, whether *Messer* had a lien on the horses for their keep and charges for training, and *secondly*, whether, if he had such lien, it was not destroyed by his having levied and taken the horses in execution for a debt due to him from the bankrupt; and if the answer to either of these questions be un-

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favorable to the defendants, they can have no valid defence to this action. We are of opinion, that it is unnecessary to consider the first question; as, if *Messer* ever had a lien, it was destroyed by his suing out the execution at his own suit. If he had relinquished or given up his right to the possession of the horses, his lien would have been destroyed. If a third person had sued out execution, *Messer* might have insisted on his lien, but he himself caused the sheriff to seize the horses and sell them under the writ, and he expressly affirmed the right to sell, by becoming the purchaser himself. He, therefore, not only set up no lien against the sale, but thought his best title was to be acquired under it. The instant the horses were seized under the writ, the right of possession passed to the sheriff, in order to enable him to sell, and such right was entirely gone from *Messer*. After he had relinquished it, he did not acquire it again by virtue of his lien, but as a purchaser from the sheriff. Although the equitable right of lien which exists between debtor and creditor, cannot be too much favoured, yet it does not extend to a case where the rights of third persons intervene, who claim under the estate of an insolvent, or of a party who has become bankrupt; and if a person, having in his hands goods of a third party, does not claim a right of lien, but gives up possession without insisting on his lien, he thereby waives it. On this ground, therefore, we are of opinion that this rule must be—

Discharged (a).

(a) See *Wallace v. Woodgate*, 1 Mood. & Malk. 236; S. C. 3 Ryan & Mood. 193; S. C. 1 Carr. & Payne, 520. & Payne, 575; *Bevan v. Waters*,

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MARMADUKE STROTHER and HANNAH STROTHER v. ROBERT BARR and LEWIS MORGAN.

Wednesday,
June 25th.

THIS was an action on the case, brought to recover damages for an injury done by the defendants (commissioners for regulating the town of *Leeds*), to the reversionary interest of the plaintiffs, by pulling down certain posts which supported a wooden building devised to the plaintiffs as tenants in common, which posts the defendants alleged to be a public nuisance.

At the trial, before Mr. Justice *Bayley*, at the last Assizes at *York*, the plaintiffs called two witnesses, of the names of *Ingle* and *Milner*: the former of whom said, "that he occupied part of the building in question; that the plaintiffs were his landlords; that he took the premises of both of them; that he had an agreement in writing, which he signed his name to, at the rent of 3*l.* 18*s.* a year; that he had held seven years, and had wrought out the rent every year; and that *Milner* occupied another part of the building on the same floor as the witness;" and *Milner* said, "that he paid rent for what he occupied to the plaintiff Mr. *Strother*, and that he did not know Miss *Strother*." On which it was objected for the defendants, that the plaintiffs could not recover, on two grounds:—*First*, that they had not proved a joint interest in the premises, or that they were entitled to recover as reversioners, as one of the witnesses stated that he occupied under one only;—and *Secondly*, that the written agreement which *Ingle* said he had signed, should have been produced. A verdict was taken for the plaintiffs, damages, one shilling, the learned Judge reserving leave to the defendants to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion that either of those objections was well founded.

In an action on the case for an injury done to the plaintiffs' reversion, they proved that they were tenants in common under a devise; and a witness stated that he occupied part of the premises under both the plaintiffs, and that he had at first an agreement in writing, which he signed; and another witness said, that he occupied under one of the plaintiffs only, and that he did not know the other:—*Held*, that there was sufficient evidence to go to the Jury, of a tenancy by both the occupiers under both the plaintiffs. But *quære*, whether it was not incumbent on the plaintiffs to produce the agreement, in order to shew the nature of their reversion.

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Mr. Serjeant *Cross*, in the last Term, obtained a rule *nisi*, and cited the case of *Cotterill v. Hobby* (a).

Mr. Serjeant *Wilde*, on a former day in this Term, shewed cause, and—

Mr. Serjeant *Cross* having been heard in support of his rule, the Court took time to consider, and, being divided in opinion, they, on this day, delivered their judgments *seriatim* as follows:—

Mr. Justice GASELEE.—This case comes before the Court upon a motion to set aside a verdict which has been found for the plaintiffs, with one shilling damages, and to enter a nonsuit. The cause was tried before my brother *Bayley*, at the last Assizes for the county of *York*. It was an action on the case for an injury done by the defendants to the reversionary interest of the plaintiffs in a certain wooden building called *Noah's Ark*, by pulling down certain posts and foundation stones which formed part of the support of the building, projecting over a beck or stream. The only point to be now considered, is, whether or not the plaintiffs sufficiently proved that they had a reversionary interest. In the declaration, the premises were stated to be in the occupation of one *Joseph Ingle* and one *William Milner*. *Ingle* was called to prove the plaintiffs' case, and he stated, that he was tenant to the plaintiffs, and occupied a part of the "*Noah's Ark*," and that *Milner* occupied another part; that he (*Ingle*) had held it for seven years at the yearly rent of 3*l.* 18*s.*, and that at first he had an agreement in writing, which he had signed. The plaintiffs then put in the will of *Mary Strother*, the mother of the plaintiffs, which was read, when it appeared that the premises in question were devised to *Marmaduke Strother*

(a) 4 Barn. & Cress. 465; S. C. 6 Dowl. & Ryl. 551.

and *Hannah Strother*, the plaintiffs, as tenants in common. *Milner*, the other tenant, being called, stated, that "he had paid rent for that part of the building which he occupied under *Marmaduke Strother*, and that he did not know *Hannah Strother*." It did not appear that *Milner* had made any written agreement; but it was contended, by the counsel for the defendants, that the plaintiffs should have produced the agreement signed by *Ingle*; as (amongst other things) the *quantum* of damages which they would be entitled to recover would depend upon the length of *Ingle's* term; and it was also objected, that *Milner* merely proved a tenancy under one of the plaintiffs, *viz.* Mr. *Strother* only. The learned Judge who tried the cause, thinking it desirable to have the case decided upon the merits, directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter a nonsuit, if the Court should be of opinion that the plaintiffs should have been nonsuited on the above objections. In consequence of the leave so given, an application has been made to this Court, and a rule granted, calling on the plaintiffs to shew cause why that verdict should not be set aside and a nonsuit entered in lieu thereof. Counsel have been heard on that rule, and my opinion, unfortunately, differing from some other members of the Court, it devolves on me first to state my views of the question. Upon the best consideration I have been able to give the case, I am of opinion that the rule should be discharged. I do not mean to deny the principle long established, that the contents of a written agreement cannot be proved otherwise than by the production of the instrument itself; and, had it been necessary in this case to have proved the terms of the tenants' holding, I should have been of opinion that the production of the agreement would have been the only proper evidence. But it does not appear to me to have been necessary that any one item of the agreement should have been proved. The facts required to be shewn were simp-

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ly these:—That the plaintiffs had an interest in the premises, and that the persons named in the declaration were their tenants. These two facts were capable of proof, and were actually proved, without the production or intervention of any agreement. In the course of the last year a case was decided in the Court of *King's Bench*, in every respect so like the present, that I cannot perceive the smallest ground of distinction between them. Without going into all the authorities on the subject, I shall, therefore, merely refer to that case, which appears to me to be an authority decisive of this point. It is the case of *The King v. The Inhabitants of the Holy Trinity, and St. Margaret, Hull* (a). The question there was, whether or not a pauper was entitled to a settlement in respect of the occupation of a tenement of the yearly value of 10*l*. In order to prove the right of settlement, the counsel for the appellants were proceeding to shew that the pauper was in the occupation of a tenement of that value, and had paid rent for it, when the respondent's counsel interposed, and asked the pauper, whether the contract under which he held the tenement was not in writing; and, upon his answering in the affirmative, it was objected, that no parol evidence could be received upon the subject, but that the document itself must be produced, or the loss of it proved. The counsel for the appellants submitted, in reply, that they were not examining as to the contents of the document, which were immaterial to the issue, as all that they proposed to prove, was the fact of the occupation of the tenement, and the amount of the rent; which they contended they had a right to do, by the cross-examination of the pauper, without any reference to the written agreement. The Court of Quarter Sessions thought that the agreement ought to have been produced, or its absence accounted for, and that, neither having been done, its contents could not

(a) 1 Man. & Ryl. 444; S. C. 7 Barn. & Cress. 611.

be proved by parol. The evidence was consequently rejected. The case was afterwards brought before the Court of *King's Bench*, when counsel in support of the order of Sessions cited the case of *The King v. The Inhabitants of Castle Morton* (a), where an unstamped agreement in writing, for the purpose of letting a tenement at a certain rent, being lost, it was held, that parol evidence of its contents was not admissible to shew the value of the tenement. But in that case the plaintiff was not merely to prove the relation of landlord and tenant, but also that there was a rent of the value of 10*l.* a year, which was the essence of the case, and could only be proved by the production of the contract itself; and Lord Chief Justice *Abbott* having been referred by counsel to the case of *Dover v. Maestaer* (b), said: "The promissory note was there admitted in evidence, on the ground that the defendant, who had been guilty of a crime, should not be allowed to relieve himself from the consequences of it by such an objection. And so, in the case of forgery, a prisoner cannot object that the forged instrument, when produced, cannot be given in evidence for want of a proper stamp. But this case is very different; for the parties here seek to shew the value of a tenement by the proof of a contract previously entered into respecting it. The contract was not, therefore, in this case, collateral, but of the very essence of the case."

In the case of *The King v. The Inhabitants of Hull*, Mr. Justice *Bayley*, interrupting counsel in the course of the argument, said (c): "The appellants did not enquire into the terms or contents of the written agreement: they simply asked a question as to the fact, whether the pauper had or had not been tenant of the premises, in a particular parish. Surely, in reply to that question, the witness ought to have been allowed to say, 'I was the tenant of

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(a) 3 Barn. & Ald. 588.

(b) 5 Esp. Rep. 92.

(c) 1 Man. & Ryl. 446.

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A.'” And, in giving the judgment of the Court, that learned Judge said: “The *contents* of this written agreement, undoubtedly, could not be proved by parol; and, therefore, it was properly held, in the cases which have been cited, that where such a written agreement was in existence, the terms of the tenancy, or the amount of the rent, could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties, at a particular time, in a particular parish. I think, decidedly, that proof by parol, of the fact of the pauper’s having been tenant, was receivable, and, therefore, that the Sessions were wrong.”—Now, what was the evidence in this case? There was not one syllable of proof of what quantity of rent was reserved, or to be paid, under the agreement, and it was not necessary to prove any thing of that kind. All that it was requisite to prove was, that the plaintiffs were the landlords of the premises mentioned in the declaration; that they were tenants in common; and that the persons named as tenants in the declaration, held under them. Now, how were those facts proved? The landlords’ right was proved by the best of all possible evidence. They claimed under a devise by *Mary Strother*, and her will was put in and read, when it clearly appeared that the plaintiffs were tenants in common, and were entitled to the interest they claimed under such will. The next fact proved was, that *Ingle* and *Milner* were tenants of the plaintiffs, and were in possession and occupied under them. That, I conceive, would be *prima facie* evidence of a seisin in fee, although, perhaps, of itself not sufficient. The first witness, however, proved not merely that he occupied the premises, but that he was in possession as tenant thereof to both the plaintiffs, to whom he paid rent. That was all that it was necessary to enquire into. The objection taken at the trial was, that there was no evidence of the value of the reversionary interest claimed by

the plaintiffs; and therefore, that the damages could not be ascertained. If, indeed, the plaintiffs had gone for damages commensurate with their title, and wanted to prove it, that would have raised a different question, and they must have taken some other course to make out their case. But the plaintiffs did not go for damages, if they had, they would no doubt have produced the agreement, that being the best, or indeed the only, proof of the extent of their interest. This is, therefore, like every other case, where no real damages are to be proved. It was shewn that an injury was done; but the plaintiffs were content to take nominal damages. In such a case, can it be requisite to prove the whole extent of their title to the reversion? I apprehend not; because, in the case which will most probably be relied on as deciding this point, the Court, although there was no evidence of damages, held, that the party was entitled to a shilling. I allude to the case of *Cotterill v. Hobby* (a), which was an action for an injury done to the plaintiff's reversionary interest in land, by cutting down a tree. The first witness stated, that he was tenant to the plaintiff under a written agreement; and the Court held that it was necessary to produce that agreement, because the question was, whether or not the tree had been demised to the tenant together with the land, and that fact could only be ascertained by a reference to the agreement itself. As, however, there is no question of that sort here, I do not think the case at all applicable. Besides, the Court there held, that the plaintiff might recover on the count in trover, the defendants having cut down a tree which was proved to belong to the plaintiff; but, whether he claimed it as reversioner, or as occupier of the premises, or by any other title, was not the question for the consideration of the Court. The plaintiff was clearly entitled to the tree, in whatever character he sued, viz. as reversioner, or as occu-

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pier, and was also entitled to recover the value of the tree, inasmuch as evidence was given to prove his title to it. I am, therefore, of opinion that this rule ought to be discharged.

Mr. Justice BURROUGH.—I am extremely sorry to differ from my brother *Gaselee*, but I am clearly of opinion, that this rule ought to be made absolute. The application of the rules of evidence depends mainly on the nature of each particular action. Here, the plaintiffs claimed to have a reversionary interest in lands which are in the possession or occupation of other persons; but it must be recollected, that the defendants are entire strangers to such interest, as they are not the tenants or occupiers, but merely wrong-doers. I admit that payment of rent is *primâ facie* evidence of a reversion in the plaintiffs; but when one of the witnesses said, that he was tenant to the plaintiffs, and that he held under a written agreement, no parol evidence was receivable. The agreement itself should have been produced; as, whether or not the plaintiffs were entitled to a reversion, would depend on the construction of that instrument, which, when produced, might shew an interest different from that of a reversionary interest. It is impossible to say what interest the plaintiffs had, unless the agreement were put in. It was not produced, and therefore there was no evidence to go to the Jury, to prove what reversion the plaintiffs had. They, therefore, failed in a most material point. The verdict having been taken for nominal damages proves nothing. There was no evidence that entitled the plaintiffs to damages. If I had presided at the trial, I should have directed a verdict for the defendants. It is the common course in trials at *Nisi Prius*, if a party holds under a contract in writing, to produce it, and no other evidence is receivable to explain or vary its contents; and here, as the plaintiffs did not produce the agreement, although it was proved to be in writing, they made out no case against the defendants, as wrong-doers.

This is not like the case of an action of ejectment, where a party holds under a lessor; in which it would be sufficient to shew a holding. Still, however, if such holding were under a written agreement, the instrument itself should be produced. Upon the whole, therefore, it appears to me, that the general rule of evidence, as laid down by the text writers, with respect to the admissibility of parol evidence to explain the contents of a written instrument, is particularly applicable to this case; and as one of the witnesses proved that he held under a written agreement, it ought to have been produced. I, therefore, think that the rule for setting aside the verdict for the plaintiffs, and for entering a nonsuit, should be made absolute.

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Mr. Justice PARK.—The first point to be considered in this case, and which was raised at the trial, is, whether there was sufficient evidence to go to the Jury, of an occupation of the premises in question by *Ingle* and *Milner*, the two persons named in the declaration, under the joint-ownership of the two plaintiffs, and not of one singly; the witness *Ingle* having proved his tenancy under both *Marmaduke Strother* and *Hannah Strother*; and *Milner*, the other witness, having only proved his tenancy under *Marmaduke Strother* alone. On this point, I think that there is little if any doubt as to the sufficiency of the evidence of a joint holding under the two plaintiffs. The first witness proved a payment of rent to both, and the other only stated that he did not know Miss *Strother*, that he had paid rent to her brother, and that the payment was made for a part of the same tenement for which the other tenant paid the two plaintiffs jointly. I am therefore of opinion that there was sufficient evidence of a joint ownership in the plaintiffs, and of a tenancy by both the occupiers. The main question then is, whether, in order to prove a reversion in the plaintiffs, it was necessary to give more evidence than was given at the

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trial; viz. whether it was requisite to produce the agreement under which one of the tenants said he had held a part of the premises demised. I am of opinion that it was not. Let us see what was proved. The plaintiffs had the property devised to them, as tenants in common, by the will of *Mary Strother*, which was read. It does not state what *quantum* of estate they had: but, in the absence of other proof, the estate being devised to them, and rent being paid to them, it is to be presumed, until the contrary be shewn, to be a tenancy in fee. The occupiers could not have the fee; for that would have required a conveyance by deed: whereas this is only said to be an agreement. But it was said by counsel at the trial, that the agreement ought to have been produced, because (amongst other things) the plaintiffs, without it, could not shew the amount of the damages; for they could not shew the extent of their reversion, upon the duration of which their injury and damage would depend. That is certainly so: but what is that to the defendants? The plaintiffs are the losers by that, and they *have* lost; for they have only got a verdict for *one shilling* damages: and, if they had only had a week's reversion, they could not have got less. This, I think, is all that I need say on this part of the case. I should have gone further, but I apprehend I am fully borne out by authorities, in the opinion I have expressed as to this point, although, in this matter, as well as in most others, there is a contrariety of decisions. I am a great enemy to vacillations in judgments; and even if there were many cases the other way, yet, finding cases comparatively modern in support of my present opinion, I think it better to stand upon the latter authorities. The doctrine I wish to be understood as holding, is this:—That parol evidence of the contents of a written instrument cannot be given, where the contract contained in such instrument is the subject of the suit; because *the terms* of the agreement must depend

on the written instrument. Thus, in the case of *Brewer v. Palmer* (a), where an action of *assumpsit* for the use and occupation of certain premises, which had been demised by an agreement in writing, was brought, Lord *Eldon*, then Chief Justice of this Court, nonsuited the plaintiff on the non-production of the writing: and properly, because the *terms* of the holding must have been proved; and they could be allowed to appear only from the agreement itself. The principle, as far as I have been able to discover it by reference to many cases, is that shortly stated by my Lord *Tenterden*, in his usual neat and precise manner, "The parties seek to shew the value of a tenement by the proof of a written contract previously entered into respecting it. The contract, therefore, was not *collateral* but of *the very essence of the case*;" and therefore it could not be proved by parol evidence. That was the opinion his Lordship gave in a short, but very correct judgment, in the case of *The King v. The Inhabitants of Castle Morton*, to which my brother *Gaselee* has alluded. There, a pauper, being removed, claimed a settlement by reason of his having rented a tenement of ten pounds a year, which [it appeared that he held under a written agreement; inasmuch, therefore, as the amount of the rent agreed to be paid could not be ascertained without reference to the agreement, the Court held that it should have been produced; as the contract was not *collateral*, but of *the very essence of the case*. The same observation applies to the case of *Dover v. Maestaer* (b). On the other hand, there is a case which has not been noticed, *viz.* that of *Bucher v. Jarratt* (c), which was decided in the year 1802, where, in an action of trover for the certificate of a ship's registry, it was held that the certificate might be proved by the production of the registry

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(a) 3 Esp. Rep. 213.

(b) 5 Esp. Rep. 92.

(c) 3 Bos & Pul. 143.

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from which it was copied; although no notice had been given to produce the certificate itself. Lord *Alvanley* was then Chief Justice of this Court, and each of the Judges gave his opinion at length in that case. The judgment of Mr. Justice *Chambre*, in particular, states the point most neatly, and carries the principle to the full extent of the present case; he says: "There is an essential difference, as I conceive, between the mode of proving a very general or a very minute description of a written instrument. The rule, undoubtedly, is, that no evidence can be received of the contents of a written instrument, but the instrument itself. But, in this case, the plaintiffs declared in trover for a written instrument, describing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the defendant to produce the instrument itself." There is also the case of *How v. Hall* (a), which was decided in 1811, on the same principle as that which I have just mentioned. It was an action of trover for a bond, and it was contended that the plaintiff might give parol evidence of it, to support the general description of the instrument as set forth in the declaration, it not being necessary, in such an action, to go into minute particulars of the contract, or to produce the instrument itself; and the Court, having entered fully into the case, held, that in the nature of things it was not necessary that it should be so, and that the production of the bond was not required. The same point was decided by Lord *Ellenborough*, at *Guildhall*, in the case of *Corder v. Hannam* (b).

In *Jolley v. Taylor* (c), which was an action of *assumpsit*, against the proprietor of a stage coach, on a promise to carry three promissory notes of 5*l.* each, from *Ware* to *London*, it was objected by Mr. Serjeant *Best*, that, before the plaintiff could be permitted to give parol evidence

(a) 14 East, 274.

(b) M. T. 1813.

(c) 1 Campb. 143.

of the contents of the notes, he should have proved a notice to produce them; as promissory notes, like all other written instruments, should speak for themselves, and cannot be described according to the loose recollection of witnesses; but Sir *James Mansfield* said: "A notice here appears to me to be unnecessary. I can make no distinction, as to this purpose, between written instruments and other articles—between trover for a promissory note, and trover for a waggon and horses."

So, in *Davis v. Reynolds* (a), in which case I was counsel for the plaintiff, just before I left the bar, *Cowper & Co.* of *London* had bought a quantity of flax of *Peacock & Co.*, who resided in the north of *England*, the flax was consigned to *Cowper & Co.*, and, upon its arrival, was landed on the defendant's wharf in *London*; *Cowper & Co.* had transmitted to *Peacock & Co.* their acceptance for the amount, and sold the flax to the plaintiff, who had paid them the amount, and taken a receipt. In trover for the flax, the plaintiff was allowed to prove his title by parol, although the bill of lading, which had been indorsed to him, was not admissible in evidence for want of a stamp; and Lord *Ellenborough* said: "The right of possession follows the right of property. When the goods arrived at the wharf, they were delivered to the wharfinger as the bailee, for the benefit of the person entitled. At that time, *Cowper & Co.* were entitled, for they had paid their accepted bill for the goods, which does not appear to have been dishonoured. They had thereby acquired a right of property, which they were competent to assign." In *Doe dem. Sir Mark Wood v. Morris* (b), it was held, that, in ejectment, the landlord, having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving, on cross-examination, that an agreement *relative to*

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(a) 1 Stark. Rep. 115.

(b) 12 East, 237.

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the land in question, the contents of which the witness did not know, was produced at a former trial between the same parties, and was, on the morning of the trial, seen in the hands of the plaintiff's attorney; no notice having been given by the defendant to produce that paper: for, though it might be an *agreement relative to the land*, it might not affect the subject-matter of the action, nor even have been made between those parties. In the present case, it could not be necessary, in order to prove the reversionary interest to be in the plaintiffs, to produce an agreement with their tenant or lessee, when it was clearly proved that they (the plaintiffs) held the premises as tenants in common, under the will of *Mary Strother*, which was given in evidence; and, although it did not appear what precise *quantum* of interest passed to them by that devise, still there was sufficient *prima facie* evidence of a holding in fee, until the contrary was shewn. Lord *Ellenborough*, in giving his judgment in the case of *Doe dem. Sir Mark Wood v. Morris*, said: "How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back. Enough, at least, ought to appear to shew that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received; but it did not appear that it was an agreement *between these parties*, or that it was an existing agreement at this time. It might have been an agreement between the defendant and his former landlord, or it might have related to a former period of the tenancy. The witness did not profess to know any thing of the contents of the paper, but only that it was an agreement relative to the lands in question. We determined a case of *Doe dem. Shearwood v. Pearson*, similar to this, in the last term, where the rule for a new trial, which was moved for on the same ground, was finally

discharged.” In the case of *Stevens v. Pinney* (a), which was an action for work and labour, the plaintiff having proved the value of the work done, and closed his case, one of the defendant’s witnesses swore that there was a memorandum in writing, containing an estimate of the prices at which the work was to be performed, and produced a copy in the hand-writing of the plaintiff, but unstamped, and not signed by either the plaintiff or the defendant. My learned brother *Burrough*, who tried the cause, held that the plaintiff was not thereby precluded from recovering on the common counts, as it did not appear whether or not the original memorandum was in existence; and that, as the defendant had given no notice to produce it, the testimony should, at all events, have come from one of the plaintiff’s witnesses on cross-examination. I do not think that that case applies to the present, but it afterwards came before the Court, when the ruling of my learned brother was confirmed. But it seems to me to be quite impossible to distinguish the reasoning in the judgment of the Court of *King’s Bench* in the case of *The King v. The Inhabitants of the Holy Trinity and St. Margaret, Hull*, from the present. If that case be law, it is unnecessary to go back to more remote decisions. Mr. Justice *Bayley*, in giving his judgment, said (b): “The contents of this written agreement, undoubtedly, could not be proved by parol; and, therefore, it was properly held, in the cases which have been cited, that, where such a written agreement was in existence, the terms of the tenancy, or the amount of the rent, could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact that the relation of landlord and tenant existed between particular parties, at a particular time, in a particular parish. I think, decidedly, that proof by parol of

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(a) 2 B. Moore, 349.

(b) 1 Man. & Ryl. 448.

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the fact of the pauper's having been tenant, was receivable, and, therefore, that the Sessions were wrong." The rest of the Court concurred in opinion with that learned Judge.

There is a discrepancy between the cases on this subject, which is much to be lamented. The case of *The King v. The Inhabitants of the Holy Trinity, Hull*, is much posterior, in point of date, to that of *Cotterill v. Hobby*. The decision, however, on which I chiefly rely, and to which I pay the most unfeigned respect, is the case of *Doe dem. Shearwood v. Pearson*. The short note of that case, as reported in *East (a)*, is as follows: "The objection arose upon the notice to quit. The son of the lessor of the plaintiff proved that he had received rent of the defendant, for his mother; and the time of these receipts agreed with the time for which the notice to quit was given; but he also spoke of the time for quitting, from a written agreement entered into at the time of the taking, between his mother and the defendant, which he said he had lately seen in the possession of his mother; whereupon the objection arose, that the agreement ought to have been produced; which was over-ruled by Mr. Justice *Chambre* at the trial at *York*; and, on its coming before the Court to set aside his opinion, the rule was finally discharged."

Now, when such a man as Mr. Justice *Chambre*, whose knowledge in his profession was so considerable, whose clearness of head, and accuracy of understanding, were well appreciated by all his contemporaries, held this opinion; and when that opinion was confirmed and sanctioned by the very eminent persons who were at that time Judges of the Court of *King's Bench*—Lord *Ellenborough*, Mr. Justice *Grose*, that able and consummate lawyer, Mr. Justice *Le Blanc*, and Mr. Justice *Bayley*—greatly as I lament differing from my Lord Chief Justice and my bro-

(a) 12 East, 239, n.

ther *Burrough*, whose opinions I highly respect and value; if I err, I err with those, to err with whom, and on whose authority, no Judge need be ashamed. I, therefore, agree with my brother *Gaselee* in thinking that this rule ought to be discharged.

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Lord Chief Justice BEST.—Since this case was argued at the bar, it has occupied a great deal of my attention; and I have anxiously endeavoured to reconcile my opinion with those of my two learned brothers from whom I have the misfortune to differ. I have not, however, been able to do so. I therefore feel it my duty to declare my sentiments, notwithstanding I feel great distrust, after what I have just heard.

I seldom pass a day in a Court of *Nisi Prius* without wishing to see some written statement of the transactions out of which causes of action arise; for, from want of attention and observation at the time, as well as from the imperfection of human memory, and from witnesses frequently being too ignorant to understand what is passing on the points they are called on to prove, or being too much under the influence of prejudice to give a true account, there is often great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that, in all cases, the best evidence that could be obtained should be produced; and text-writers on the law of evidence say, that, if the best evidence be kept back, it raises a suspicion, that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first principle referred to in the books as establishing this governing rule is, that, where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost; and the main, if not sole, enquiry always must be, whether the facts proved, formed a part of the contents of a written instrument, which could only be

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established by the production of the writing itself. It is assumed, that this case is not within that rule, as the plaintiffs did not offer parol evidence of the contents of the agreement for the letting of the premises for the injury to which the present action was brought. This will be found to be a mistake, for the declaration alleges, that the plaintiffs had let the premises to certain tenants who were named, and that the act or conduct of the defendants was injurious to the reversion which the plaintiffs had in them. That statement should have been proved; and, if so, the written agreement, which contains all the evidence of the circumstances under which the premises were demised, was the best evidence to establish it. If, then, there had been no contract in writing, the testimony of the tenants, that they occupied the premises said to have been injured by the defendants, and that they paid rent for them to the plaintiffs, would have supported the declaration, and such testimony would have established the fact of the relation of landlord and tenant between these parties, and would also have shewn that the plaintiffs must have had a reversion in the premises, at the expiration of a regular notice to quit, or, at furthest, at the expiration of three years; that being the longest period for which a parol lease could, by the statute of frauds, be granted. But, as it was stated that there was an agreement in writing, that instrument was better evidence of the relation of landlord and tenant than any parol evidence that could be adduced. It must have contained a description of the premises, the names of the persons to whom, and of those by whom, and the term for which the premises were demised. Those parts of the contract or agreement could only be proved by its production; and, therefore, the contract itself was the best, and in my opinion the only admissible evidence. There is one fact, *viz.* the *duration of the term*, which cannot be collected or inferred from the evidence given, and which could only be obtained by the production of the agreement itself. It has been

said at the bar, that, as the plaintiffs were content to take nominal damages, it was not material to shew at what period the estate alleged to have been injured was to revert to their possession. But it does not appear from the evidence that they had any reversion. The estate might have been granted in fee, or assigned for a long term. In the one case, the plaintiffs could have no interest; and, in the other, I much doubt whether they would have such an interest as would enable them to maintain an action for an injury done to so remote a reversion. In order to support an action of this nature, there must be some actual damage, as the action of *tort* differs materially from that of trespass, and it would be impossible to prove any damage in the cases I have supposed.

The objection, however, on which I found my opinion, is, that, in proving the description of the premises, and the relation of the lessors and tenants or occupiers, the plaintiffs attempted to establish by parol facts which were to be found only in the written instrument or agreement. It cannot be denied, that, to prove the *amount* of rent, if that were necessary, the agreement, being the best evidence of the fact, must have been produced. The agreement also contained the names and description of the parties, as well as of the premises, and the term for which they were demised; and if the agreement must be produced to prove the amount of rent, it should, for the same reasons, be produced in order to shew these other facts. Although the amount of rent might be shewn, by calling the tenant to prove the payments he has made, and the accuracy of his testimony might be confirmed by the production of the landlord's receipts; yet no lawyer will contend that the amount of the rent could be proved by any other evidence than the lease; because it is the best evidence of the terms on which the tenant holds the premises: and if it be the best evidence of the amount of rent, it must also be the most certain evidence of the description of the premises demised,

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and of the parties to the instrument, between whom it has established the relation of landlord and tenant. I defy sophistry itself to give a more satisfactory reason why the production of a lease or other writing is deemed to be necessary to prove its contents. Lord *Mansfield*, many years since, declaiming against the introduction of subtleties and refinements into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, said he, that these should be got rid of. No additions should be made to them. Our jurisprudence should be bottomed on plain broad principles, such as not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to adhere to more fixed rules. If plain intelligible rules are more necessary in one part of our law than in another, that necessity exists more strongly in the law of evidence. It must be remembered that the law of evidence is the same in actions for injuries to reversions, as in cases of high treason. One of the most learned writers on the spirit of the laws of *England*, has said that uncertainty in the law of high treason would prevent any state from being free. This was the opinion of our ancestors, when, in *Edward* the Third's time, they crushed, by one statute, all the subtleties and uncertainties that had been introduced into our laws. The relaxing the rules of evidence would prove far more dangerous in the administration of justice, than all the constructive treasons that ever were invented.

Suppose it to be proved, under an indictment for treason, that arms and treasonable papers are found in a certain house, and that, to prove the house to be in the occupation of the prisoner, the landlord is called, and says,

that the prisoner took the house of him, and paid him rent; and that, upon this, the witness is asked, if he did not let the house under an agreement or lease in writing, and he answers in the affirmative; and an objection is then made for the prisoner, that the written instrument is the best evidence to shew who was the tenant of the house; and the Judge answers, if you wish to prove the contents of the lease, you must produce it: but, it may be said, the prosecutors only want to shew that the prisoner was tenant, and although the lease would certainly shew that, yet the tenancy of the prisoner may be proved by the payment of rent.—If a gun-smith from *Birmingham* were called, and proved that the prisoner was the person who bought fire-arms from him, that he sent them to this house, and that a person who appeared to be the tenant or occupier, and who resembled the prisoner, paid for them. He is then asked, whether the order for the arms was not in writing, and if he ever before saw the prisoner. He answers that the order was in writing, and that he never saw the prisoner before, unless the person who paid for the arms was he. He is then asked if the prisoner was the person who paid for them; but he cannot swear to his identity. An objection is then made, that the order should be produced and proved to be in the hand-writing of the prisoner. The Judge says, (as he must do), these arms were sent to a house of which the prisoner is tenant; they are proved to have been paid for at the time by a person who appeared to be the occupier, and who resembled the man at the bar: this is evidence (the Judge adds) from which the Jury may infer that the prisoner was the person who bought the arms. The prisoner is convicted, and, on further inquiry, the lease and the letter or paper containing the order to the *Birmingham* manufacturer for the arms, are produced, and it appears from the lease, that the house was let to the prisoner's brother, who strongly resembled the prisoner; and the letter to the

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manufacturer is shewn to have been written by the brother, in his own name, and not in the name of the prisoner. Would any Judge venture to advise the King to execute the prisoner under such circumstances? In this dilemma would the government be placed by the reception of evidence like this; and on this the present plaintiff's case rests. Notwithstanding the difference that there is between the importance of the inquiry in the criminal and civil Courts, the rules of evidence are the same in both. I should not hesitate, on principle alone, unsupported by any previous determination, to say that the contents of a lease or written contract, can only be proved by the production of the instrument itself, not only to shew the amount of rent, but what were the premises demised, and who were the parties to the instrument, as well as the different clauses or conditions by which each are bound. The rule of law relative to the proof of the contents of written documents, is laid down with great clearness, by Lord *Tenterden*, in the House of Lords, in *The Queen's* case, as follows (a):—"The contents of every written paper, are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence." Let us see how this principle has been acted upon in the cases that have come before the Courts. In *Hodges v. Drakeford* (b), a witness proved, that the defendant, a baker, had advertized his shop to be let, and that the advertisement stated, that the consumption of the shop amounted to fifteen sacks of flour *per* week; that the defendant, being applied to by the plaintiff, shewed him the premises, and said that it was a very good shop, and did business to the full extent stated in the advertisement. It being admitted, however, by the witness who proved these facts, that there was an agreement in writing, the Court held, that, as the agreement upon which the ac-

(a) 2 Brod. & Bing. 286.

(b) 1 New Rep. 271.

tion was founded was in writing, the plaintiff could not make out his case without producing that agreement. It makes no difference as to the proof in such cases, whether the action be brought for a breach of the agreement itself, or whether the agreement be merely necessary in order to shew the right to be in the plaintiff, in virtue of which he complains of the injury that forms the subject matter of the action. *Brewer v. Palmer* (a), is only a *Nisi Prius* case; but it was decided by one of the most eminent Judges that ever sat in *Westminster Hall*, and is quoted with approbation by every text writer on the law of evidence. It was afterwards confirmed by the Court in *Banc*, and has been ever since recognized and acted upon. It was an action for use and occupation. There was an unstamped agreement in writing, and, at the trial, it was contended by the plaintiff's counsel, that he was at liberty to go into evidence of the use and occupation by the defendant. So, here, both witnesses proved that they occupied the premises in question, as tenants under the plaintiffs; but Lord *Eldon* held, that the plaintiff was bound, if there was a lease, to produce it in evidence, as it might contain some clauses which would prevent him from recovering; and that, therefore, for the benefit of the defendant, it ought to be produced. So, here, the agreement, if produced, might have shewn that the plaintiffs had no right to recover in this action. The case of *Brewer v. Palmer*, is confirmed by that of *Ramsbottom v. Tunbridge* (b), which latter case the Court held to be distinguishable from the former, as the paper produced did not appear to have been signed by any of the parties, and therefore was only collateral to the taking, and not like an original minute.

In *Doe d. Sir Mark Wood v. Morris* (c), in an action of ejectment, the landlord having proved payment of rent by the defendant, and the service of a regular notice to quit, a witness said that there had been an agreement in writing

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(a) 3 Esp. Rep. 213. (b) 2 Mau. & Selw. 434. (c) 12 East, 237.

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relating to the lands sought to be recovered, but not to the existing tenancy between the plaintiff and defendant; and a verdict was found for the lessor of the plaintiff. Lord *Ellenborough*, in giving judgment, upon a motion to set aside the verdict, makes use of these words: "How can we say that the plaintiff ought to have been nonsuited, for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back? But it did not appear that it was an agreement *between these parties*, or that it was *an existing agreement* at the time." His Lordship there recognized the principle, that the best evidence must be produced, and that the best evidence of a tenancy is the agreement on which it is founded; but in that case there was no proof (as there was in this) that there was any agreement applicable to the existing tenancy. If Lord *Ellenborough* and the Court of *King's Bench* had been called on to decide this case, instead of that which was before them, in which it did not appear that the agreement related to the existing tenancy, they must, to have been consistent, have decided that the evidence tendered in this case was not admissible, as the agreement relating to the existing tenancy ought to have been produced. The case of *Cotterill v. Hobby*, which has been supposed to be in point for the plaintiffs, is, I think, favourable to the defendants, and conclusive of the question.

There, an action was brought for an injury to the plaintiff's reversion. The declaration stated, that, at the time of committing the grievances complained of, a certain close, situate, &c., was in the possession and occupation of one *H. C. Morgan*, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to him; and that the defendant cut down a quantity of branches off and from certain trees then standing and growing in and upon the said close. There was a second count in trover for the timber. The defendant pleaded the general issue. At

the trial, before Mr. Baron *Garrow*, at the *Lent* Assizes for *Hereford*, in 1825, *Morgan* was called as a witness for the plaintiff, and he proved that he was tenant to the plaintiff of the close in question, under a written agreement, and that the defendant lopped some branches off the trees growing there, and carried them away. No evidence of the value was given. For the defendant, it was objected, that the agreement under which *Morgan* held should have been produced; for that it could not otherwise appear that the plaintiff was reversioner of the trees. A similar objection was taken in this case. Mr. Justice *Bayley*, in giving the judgment of the Court, said: "It having been shewn that *Morgan* held under a written agreement, I am of opinion that the terms of the holding could only be proved by that instrument, and, consequently, that the verdict on the first count cannot be sustained." I cannot distinguish that case from the present, and it appears to me to be supported both by principle and by a variety of authorities, which may be traced back, though it is unnecessary now to do so, to remote periods. There is a long and uniform series of decisions, all recognizing the general rule upon which I put this case.

These cases, however, are unfortunately inconsistent with one lately decided by my brother *Bayley*, which is at variance with his other decision, *viz.* the case of *The King v. The Inhabitants of the Holy Trinity and St. Margaret, Hull*. That was decided by three Judges of the Court of *King's Bench*, who held, that parol evidence of the fact of a pauper's having been tenant of certain premises, was admissible, although he appeared to have held them under a written agreement. In the course of the argument in that case, Mr. Justice *Bayley* is reported to have said (a): "The appellants did not inquire into the terms or contents of the written agreement; but, simply,

(a) 1 Man. & Ryl. 446.

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whether the pauper had or had not been tenant of premises in a particular parish." Now, the objection in this case is, that there was a written agreement spoken of in evidence; and where could any evidence be found so satisfactory as the production of the instrument itself? Surely that was sufficient to cause an inquiry to be made into the contents of the agreement, and it ought to have been produced, as it would describe the nature of the tenancy between the parties, their names, and the term for which the premises were demised, which was the principal subject of the inquiry. But, Mr. Justice *Bayley*, in delivering his judgment in that case, said (a): "The terms of the tenancy, or the amount of the rent, could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties, at a particular time, in a particular parish." The learned Judge admits that the amount of rent cannot be proved by parol evidence, and that the agreement is the best evidence of that fact. Is it not equally the best evidence of who were the parties to the contract, for what period the relation of landlord and tenant was to exist, and what were the premises demised? These facts as much constitute parts of the contents of the agreement, as does the amount of rent; and there is more probability of mistake in the statement of them than in the fact of the *quantum* of rent. They are complicated facts, as to which the most accurate witnesses may be mistaken; but, as to the amount of the rent payable, they cannot err, as rent is paid frequently, and the memory refreshed and confirmed by reference to receipts given for it. Parol evidence of the amount of rent payable under an agreement, is not excluded because such amount is difficult of proof, but because parol evidence is not the *best proof* of it. So, parol evidence is not the best proof

(a) 1 Man. & Ryl. 448.

of any other fact stated in a written contract. Much as I respect the learned Judges who decided that case, I cannot agree with them. It is quite at variance with the other case before the same Judges. It makes distinctions between things, which, in point of fact, admit of no real distinction. It is inconsistent with every other case in the books, and tends to fritter away a rule of evidence that is essential to the security of property, of character, and of life. The learned Judge who tried this cause also, and reserved the point, must have doubted the propriety of the decision in *The King v. The Inhabitants of the Holy Trinity and St. Margaret, Hull*, or he would not have saved it; for it is not the practice of Judges, where a question has been decided, to the doctrine of which they have subscribed, to reserve the same point for the opinion of the Court.

I think, with my brother *Burrough*, that the rule for entering a nonsuit should be made absolute; but, as two of the Court entertain a different impression, no judgment can be pronounced.

Rule *nihil* (a).

(a) See *Vincent v. Cole*, 3 Carr. & Payne, 481.

COLLINS v. PRICE.

Wednesday,
June 25th.

THIS was an action of *assumpsit*, and brought by the plaintiff, a school-mistress, to recover a quarter's board and instruction for the infant daughter of the defendant. The *first* count of the declaration stated, that, on the 24th *December*, 1826, in consideration that the plaintiff, at the special instance and request of the defendant, would re-

The plaintiff kept a day-school, at which the defendant's daughter was the only boarder. At the end of the first quarter, the plaintiff's charge for schooling was sent to the de-

fendant and discharged. Four days after the commencement of the second quarter, the child was taken ill and sent home, and did not return to school again:—*Held*, that the defendant was liable for the whole quarter, although there was no express contract for a quarter's notice previously to the removal of the child.

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ceive his daughter into her school, and instruct and educate her, he, the defendant, undertook that she should continue, for the purpose of being so instructed, until the expiration of a quarter's notice of the defendant's intention to take his daughter away. The plaintiff then averred, that she received the defendant's daughter into her school, but that he took her away before the expiration of a quarter's notice. The *second* count stated, that the defendant promised the plaintiff to give her a quarter's notice previously to the removal of the child, but that he caused her to be taken away without giving such notice. To these were added counts for work and labour as a school-mistress, in teaching and instructing the defendant's daughter, and for board and lodging, and necessaries; and the usual money counts.

The defendant pleaded the general issue, with a notice of set-off.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, it appeared that the plaintiff kept a day-school, and that, at *Christmas*, 1826, the defendant placed his daughter there as a boarder, and that she was the only boarder. That the first quarter's account was sent to the defendant at *Lady-day*, 1827, and settled; that, on the 29th *March*, the girl was taken ill, when the plaintiff sent her home to the defendant, and she did not afterwards return to the school, and her clothes were not sent for till the 10th *April* following. Under these circumstances, the plaintiff sought to recover for the whole quarter. The defendant, a wine merchant, proved the delivery of six bottles of wine to the plaintiff, which exceeded the value of the board, &c., from the 25th *March*, when the second quarter commenced, to the 29th, when the child left the school. His Lordship left it to the Jury to say, whether, as the second quarter had begun, the plaintiff was entitled to recover for the whole of that quarter, there being no evidence of a contract by the defend-

ant to pay, or that a quarter's notice should be given previously to removal, or whether, if the plaintiff were entitled to recover for the four days, the wine furnished by the defendant would not be sufficient to answer the plaintiff's demand in that respect. The Jury found a verdict for the whole quarter, leave being reserved the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the plaintiff was not entitled to demand it.

Mr. Serjeant *Wilde*, on a former day in this Term, accordingly obtained a rule *nisi*.

The damages being under 10*l.*, the Court recommended a *stet processus*; but it was not acceded to.

Mr. Serjeant *Spankie* now shewed cause.—The second quarter having begun, and the first having been paid when it became due, there was sufficient evidence of an implied contract to pay by the quarter, and the finding of the Jury is conclusive in this respect. It is a general course of practice among those who keep schools, which has been warranted by long usage, that, if a person receive scholars to be educated by the quarter or year, the parents placing them under his care, give a quarter's notice previously to their removal. A school-master does not undertake to teach by the day, week, or month, unless there be a special contract to that effect; and if a child remains at school for a quarter of a year without any payment being made, and the account is sent in and settled at the end of that quarter, the child cannot be removed without a quarter's notice, or payment of the succeeding quarter. Here, however, the plaintiff is entitled to recover on the common counts; for the contract was clearly by the quarter, and it was not necessary for him to shew that there was any agreement or stipulation as to the notice, the second quarter having commenced. In *Gandell v. Pon-*

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tigny (a), Lord *Ellenborough* held, that, where a servant is hired by the quarter, and discharged by his master without sufficient cause, in the middle of a quarter, he may recover wages for the whole quarter, under an *indebitatus assumpsit* for work and labour; and his Lordship said, that, "having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole." So, here, the plaintiff was willing to instruct the defendant's daughter for the whole of the quarter, and no default or negligence could be attributed to the former; and, as the quarter had begun, it is impossible in principle to distinguish that case from the present. It may be assimilated to a case of use and occupation, where, if the quarter be commenced, the tenant must pay for the whole, whether he has occupied all the time or not; and, although it may be said that that depends on the relation of landlord and tenant, yet, an actual occupation is not necessary to render the latter liable to the former. So, a party may recover for his services, although none be, in point of fact, performed; as, in *Delamainer v. Winteringham* (b), where it was held, that a seaman might, under a count for work and labour, recover wages during a hostile embargo in a foreign port, whilst he was imprisoned on shore; and Lord *Ellenborough* there said, that "the action was maintainable, on the ground that there was no severance of his services." So, here, the plaintiff's services for the second quarter had begun, and, in contemplation of law, she was entitled to recover from the day of its commencement to the conclusion. A like principle was established in *Robinson v. Hindman* (c), where Lord *Kenyon* was of opinion, that, if a master turn away his servant without warning, or previous notice, and there be no fault or misconduct in the

(a) 4 Camp. 375; S. C. 1 Stark. Rep. 198.

(b) 4 Camp. 186.

(c) 3 Esp. Rep. 235.

servant to warrant it, he ought to have the allowance of a month's wages, which his Lordship thought reasonable. In *Hulle v. Heightman* (a), a seaman entered into a special contract for a whole voyage, which remained open, and he could not, therefore, recover on the common counts. So, in *Cutter v. Powell* (b), the seaman was expressly hired for the whole of the voyage, and, as the contract was entire, and he died before the voyage was completed, his representatives could not be entitled to claim his wages. The case of *Eardley v. Price* (c) does not apply, as there, there was an express contract. Here, however, as the second quarter had actually commenced, the contract must be considered as executed, and, therefore, the plaintiff is entitled to recover on the general counts in the declaration.

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Mr. Serjeant *Wilde*, in support of his rule. The cases cited do not apply either in principle or in circumstances. In *Eardley v. Price*, it appeared that, at the foot of the plaintiff's prospectus, containing the terms of his school, a stipulation was added, "that a quarter's notice was required to be given, before the removal of any young gentleman from school, or to pay for a quarter." Cases of use and occupation stand altogether on a different principle, as, if a person take a house, it is immaterial to the landlord, whether he occupy it or not, he may lock it up, or underlet (d), but he holds by virtue of his original contract. So, with respect to masters and servants, if there be a general hiring, the law implies a contract for a year, as, in the case of *Beeston v. Collyer* (e). So, a servant must be always ready to obey the commands of his master, and if he has not been guilty of misconduct, he is entitled to a month's warning, or a month's wages; but here the plaintiff applied her time

(a) 2 East, 145.

(b) 6 Term Rep. 320.

(c) 2 New Rep. 333.

(d) See *Bull v. Sibbs*, 8 Term Rep. 328.

(e) 4 Bing. 309.

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to her own purposes, independently of the business of the school, and the defendant could only be liable for the payment of the second quarter, on an express or implied contract. It is quite clear, that there was no express agreement between the parties, nor can the Court imply a contract, as there was no evidence of usage, or that the plaintiff had ever required a quarter's notice to be given. Besides, the defendant's daughter was the only scholar who lived in the house; and although, in the case of a regular boarding-school, a contract for half a year may be implied, yet here the child had only remained one quarter, when payment was demanded and received. If a horse be sent to a livery stable, it is not to be paid for by the month or quarter, although it may remain beyond those periods, but for the days it is actually kept. So, if a person gives lessons at a dancing or fencing academy, or for gymnastic exercises, and an accident were to happen to one of his scholars at the first or second lesson, he could not make a charge for the whole quarter. Here, if the plaintiff had died shortly after the commencement of the second quarter, her representatives could not be entitled to recover for the whole, and as the child was taken home in consequence of illness, she could have derived no benefit had she remained with the plaintiff, and she was therefore only entitled to a reasonable compensation during the time the child remained under her care, after the expiration of the first quarter.

Cur. adv. vult.

Mr. Justice PARK, now delivered the judgment of the Court, as follows.—This was a rule to enter a nonsuit. The action was brought for a quarter's board, lodging, schooling, &c., provided by the plaintiff, for the daughter of the defendant. There was no express contract. The question then is, whether there was not evidence from which the Jury might infer that there was an implied con-

tract from quarter to quarter. We do not think it necessary to assimilate this case to the case of the sailor's wages, as in *Cutter v. Powell* (a); nor to that of the wages during the *Russian* embargo. The former case depends upon a question, perhaps, of public policy; the latter, upon the very peculiar circumstances of the transaction. Here, the former payment on account of the child's schooling had been made for and by the quarter; a second or new quarter had been begun; and there was no intention, no declaration of any intention, to take away the child. She was not at last taken away from school by the parent: but, the child being taken ill, the school-mistress very properly sent her home. No intention was then manifested on the part of the defendant to put an end to the contract. No fault was attributed or attributable to the mistress, who would have continued her services, if the defendant would have accepted them; and therefore the Jury were well warranted in coming to the conclusion they did.

It seems, if authority were wanting, scarcely possible to distinguish the present from the case of *Gandell v. Pontigny* (b). (I quote the case from *Starkie's* reports). The declaration was for work and labour. The plaintiff had been employed by the defendant, as a clerk in his counting-house, at a salary of 200*l. per annum*, which had been paid quarterly. The defendant being displeased with the plaintiff's conduct, on the 11th *August* (in the midst of a quarter) discharged him, paying him 25*l.*, the proportionate salary for a half quarter, which would expire on the 15th *August*. The plaintiff tendered himself the next morning at the counting-house, as being ready to discharge his duties as usual, when the defendant declined his services. It was contended for the defendant, that the plaintiff was not entitled to recover on the general count for work and labour, since none had been performed subsequently to the period

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(a) 6 Term Rep. 320.

(b) 4 Campb. 375; S. C. 1 Stark. Rep. 198.

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of the discharge, and that, up to that time, the plaintiff had been paid, and the case of *Hulle v. Heightman* (a), was cited, and it was urged that the plaintiff ought to have declared specially on the contract; but Lord *Ellenborough* said, "If he has done work for any part of the quarter, it is done for the whole. This is an objection of a strict nature, and since no dissolution of the contract has been proved, the plaintiff is entitled to recover for the remainder of the quarter." That appears to us to be expressly applicable to this case. The rule therefore must be—

Discharged.

(a) 2 East, 145.

Wednesday,
 June 25th.

MARTIN, Gent., Demandant; BAXTER, Gent., Tenant;
 GRUBB and Wife, Vouchees.

A mortgagor cannot be charged with the expenses of preparing a deed of declaration of trust from the mortgagee to a *cestui que trust* who advanced the money to the mortgagor, as such deed forms no part of the security for the mortgage.

A deed of assignment of a mortgage requires an *ad valorem* stamp, if a further sum be added to the principal before secured, and the mortgagor is liable to the charge of such duty. The 3rd section of the statute 3 Geo.

4, c. 117, applies only to additional securities between the same parties, or further advances to the principal before secured.

THIS recovery was suffered for the purpose of perfecting a mortgage from *Grubb*, the vouchee, to Messrs. *Hearn & Turner*, and for securing 2,934*l.*, said to be advanced by them to *Grubb*; and he having disputed the attorney's bill of costs, it was, by order of Mr. Justice *Gaselee*, referred to the Prothonotary to be taxed, who allowed a charge of 6*l.* 6*s.* 8*d.* for a deed of declaration of trust, from Messrs. *Hearn & Turner*, to the *cestui que trust* to whom the sum advanced belonged, and who was the attorney who negotiated the business, and whose bill the mortgagor disputed. The above sum of 2,934*l.* was secured by a deed of assignment of mortgage for 2,000*l.*, from Miss *Eborall* and another, to Messrs. *Hearn & Turner*. There was also a deed as an additional security for the 2,000*l.*, which charged certain other estates of *Grubb*, the mortgagor, which were not comprised in the deed of assignment. The assignment was charged with an *ad valorem* stamp-duty, of 6*l.*, and the other

deed with a duty of 2*l.*, both of which charges the Prothonotary allowed.

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Mr. Serjeant *Jones*, on a former day in this term, obtained a rule *nisi*, that the Prothonotary might review his taxation, on the ground that the above charges ought not to have been allowed. *First*, the declaration of trust was no part of the mortgagee's security, and the mortgagor was not bound to pay for any deed or instrument that was not absolutely necessary to secure the mortgage; and *secondly*, the deed of assignment of Miss *Eborall's* mortgage, being only an additional security to the mortgagees, ought not to have been impressed with an *ad valorem* stamp, as the transaction took place since the passing of the statute 3 *Geo.* 4, c. 117(*a*), by which the stamp-duties on re-conveyances of mortgages were reduced; and deeds given as an additional or further security by the same mortgagor, are now not subject to the *ad valorem* duty.

Mr. Serjeant *Storks*, now shewed cause, and submitted, that, as the *cestui que trust* was the party who actually advanced the money, and as the declaration of trust was necessary as a security for the mortgage, and formed part of the *res gestæ*, the charges attending it ought to have been defrayed by the mortgagor. With respect to the objection as to the stamp, although the statute 3 *Geo.* 4, repealed the *ad valorem* duties imposed by the 55 *Geo.* 3, c. 184, Sched. Part 1, on the re-conveyance or transfer of mortgages, yet it does not apply to a deed or instrument containing an additional security for the advance of a further sum, or to a contract between other parties than the original mortgagor and mortgagee; and here, the additional sum of 934*l.* was to be secured to the mortgagees who were no parties to the former securities.

(*a*) The act passed in *August*, 1822.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Jones*, in support of the rule, insisted, that the mortgagor was only liable to pay the expenses or charges attending those deeds which were prepared for the security of the mortgagees. There can be no doubt but that the attorney for the mortgagees charged them a sum for procuration from the *cestui que trust* who made the advance; and as the declaration of trust was for his advantage alone, the mortgagor ought not to be burthened with it; and as the assignment of the former mortgage for 2,000*l.* was made to the mortgagees as a mere additional security, the *ad valorem* duty ought not to have been charged upon it; and if it were so held, it would obviate the effect of the statute 3 *Geo.* 4, which was passed for the express purpose of relieving mortgagors from the payment of the heavy stamp-duties imposed on them by the 55 *Geo.* 3, c. 184.

Lord Chief Justice BEST.—This was an application for the Prothonotary to review the taxation of a bill of costs, delivered to a mortgagor, by the attorney, for the expenses of preparing and securing a mortgage, the attorney himself being the *cestui que trust*, or party advancing the money. With respect to the first objection, that the mortgagor ought not to pay the expenses attending the declaration of trust, as it formed no part of the security of the mortgagees, I am of opinion that the objection is well founded, and that the charge for that deed ought not to have been allowed. Although it might be necessary to secure the repayment of the sum advanced by the *cestui que trust*, the borrower or mortgagor ought not to be charged with it.—*Secondly*, as to whether the deed of assignment required the *ad valorem* stamp which was charged to the mortgagor, will depend on the construction of the statute 3 *Geo.* 4, c. 117, which was passed to relieve borrowers of money from the expense of stamps on the re-conveyance or transfer of mortgages; and the 2nd section enacts that

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“~~from~~ and after the expiration of ten days next after the passing of the act, in lieu and instead of the duties thereby repealed, there shall be granted, raised, levied, collected and paid unto his Majesty, his heirs, and successors, the several sums of money and duties following; that is to say, upon any transfer, assignment, disposition, assignation, or re-conveyance of any mortgage, or of any other security, in the 55 Geo. 3, c. 184, and the schedule thereto annexed, in that respect mentioned, or of the benefit thereof, or of the money or stock thereby secured, *provided no further sum of money or stock be added to the principal money or stock already secured*, there shall be paid in Great Britain, a stamp-duty of one pound fifteen shillings for the first skin or piece of vellum or parchment, &c., upon which such transfer, &c., shall be engrossed, written, or printed, &c.” Here, however, the mortgagor is not entitled to the protection afforded by that clause, as the deeds in question were given to secure the additional sum of 934*l.*; and the provision in the statute is confined to the sum already secured: and although it may be said that the 3rd section may avail him, yet it enacts, that, “where any deed or other instrument already made, or hereafter to be made, as an additional or further security for any sum or sums of money already or previously secured by any bond on which the *ad valorem* duty on bonds charged by the 55 Geo. 3, shall have been paid, such deed or other instrument shall be, and be deemed to be and to have been exempt from the several *ad valorem* duties charged by the said act on mortgages, and shall be charged and chargeable only with the ordinary duty payable on deeds in general; but, if any *further sum of money shall be added to the principal money already secured*, the said *ad valorem* duties respectively shall be charged in respect of such further sum.” That section, however, appears to me to apply only to *additional* securities between the same parties, and not to a case where a mortgage is transferred or assigned by one

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mortgagee to another. I, therefore, think that the Prothonotary exercised a right discretion in allowing the *ad valorem* duties on both the deeds in question.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—I agree with my Lord Chief Justice, that the mortgagor is not liable to the charge for the deed of the declaration of trust, as it formed no part of the security between him and the mortgagees. I am not prepared to give an opinion as to the allowance of the stamp on the deed of assignment; and as it was a mere transfer from one mortgagee to another, I am strongly inclined to think that it would fall within the operation of the late statute (a). The rule, therefore, for the Prothonotary to review his taxation, must be made absolute on the first point only.

Rule absolute accordingly.

(a) This seems to be correct, for the latter part of the second section provides, that, "if any further sum of money shall be added to the principal money al-

ready secured, the *ad valorem* duty on mortgages, payable under the 55 Geo. 3, shall be charged only in respect of such further money."

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IN THE EXCHEQUER CHAMBER.

5 Bing. 129

THORPE v. COOPER, Clerk.

[In Error.]

Monday,
June 23rd.

THIS was a writ of error from the Court of *King's Bench*, in an action of debt on the statute 2 & 3 *Edw.* 6, brought by the Reverend *William Cooper* (the defendant in error), as rector of the parish of *Waddingham*, in the county of *Lincoln*, against *Thorpe* (the plaintiff in error), as occupier of certain arable, meadow, and pasture lands, situate within the parish of *Waddingham*, for not setting out tithes thereon. Plea—*Nil debet*.

At the trial, before Lord Chief Justice *Best*, at the Spring Assizes for the county of *Lincoln*, 1825, it appeared that the defendant in error then was, and since the 29th *September*, 1811, had been rector of the parish and parish church of *Waddingham cum Snitterby*. That the plaintiff in error, on and from the 29th *September*, 1817, until the 29th *September*, 1818, occupied certain meadow lands in the township of *Waddingham*, and had mowed and cut down and carried away divers crops of hay grown on such lands, of the value of 4*l.* 18*s.*, without having at any time divided or set forth for the defendant in error any tithes, and without having at any time compounded or otherwise agreed with the defendant in error, for or concerning any tithes

By an inclosure-act of 1769, commissioners were directed to allot to the rector of the parish of *Waddingham cum Snitterby*, such parcel of the arable fields and common pastures within the township of *Snitterby*, and also of the titheable parts of the township of *Waddingham*, as should (quantity, quality, and situation considered) be equal in value to two fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within the same lands and grounds; and the award of the commissioners

was to be final, unless appealed against within six months; and immediately after the enrolment of the award, all tithes arising within the lands or grounds directed to be inclosed, were to be extinguished: saving, however, to every person and persons and their heirs (other than those to whom allotments should be made in respect of their several interests) all such estate and interest as they had in respect of the lands before the passing of the act. The commissioners, by their award, allotted to the rector land in lieu of his glebe lands in *Waddingham*, and in lieu of glebe and tithes in the townships of *Snitterby* and *Atterby*; but there was no specific allotment in lieu of the tithes in *Waddingham*:—*Held*, that, as the commissioners had made no allotment in lieu of such tithes, the rector's right to the tithes in kind was reserved to him by the saving clause in the act, and that he was not barred from suing for them fifty-six years after the act had passed.

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in respect of the said crops, or any part thereof. That the parish of *Waddingham* consists of two townships, *viz.* *Waddingham* and *Snitterby*. Certain proceedings in *Chancery* in the year 1700 were given in evidence, consisting of a bill, answer, and decree. The bill set out an agreement made in 1700, between the then rector of *Waddingham*, and the lord of the manor, and all the freeholders of *Waddingham*, that certain common lands should be inclosed, and that the rector should have a certain portion of the lands, and the annual sum of 94*l.*, in lieu of tithes; and this agreement was confirmed, and ordered to be performed, by the decree. The lands on which tithes were claimed by the defendant in error, formed no part of the lands inclosed under the above-mentioned agreement and decree, but were part of the lands afterwards inclosed under an act of Parliament in 1769, hereinafter mentioned. The above-mentioned composition, of 94*l. per annum*, was proved to have been paid from time to time by the occupiers of land in the township of *Waddingham*, and accepted by the rectors until the year 1788, when a new rector, Dr. *J. Barker*, the immediate successor of *Robert Carter*, hereinafter mentioned, succeeded; the composition of 94*l. per annum* was then abandoned, and a new composition agreed upon between the occupiers of land in *Waddingham* and the then rector, at a valuation of the whole parish; and such valuation had respect, as well to the lands inclosed under the act of Parliament hereinafter mentioned, as to those inclosed under the said agreement and decree. The defendant in error was presented to the rectory of *Waddingham* in 1808, and the plaintiff in error paid his share of the composition in respect of the lands in question to the predecessor of the defendant in error, and to the defendant in error, until the year 1811. From *Michaelmas* 1811, to *Michaelmas* 1812, the defendant in error took the tithes in kind; and from *Michaelmas* 1812, the plaintiff in error

refused to pay any composition or set out his tithes in respect of the lands in question.

In the year 1769, an act of Parliament, intituled, "An act for dividing and inclosing certain open fields, lands, and grounds in the several townships of *Atterby*, *Snitterby*, and *Waddingham*, in the county of *Lincoln*," was passed. That act recited (*inter alia*), that the Rev. *Robert Carter*, Clerk, was at that time rector of the parish and parish church of *Waddingham cum Snitterby*, and as such was seised of certain glebe lands in the said open fields and grounds, and entitled to all the tithes, great and small, ecclesiastical dues, duties, and payments, arising within the titheable places of the said parish, and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Atterby*. The act then enacted, that all the said open arable fields, commons, pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, be divided and allotted by certain commissioners appointed to carry the act into execution; and directed such commissioners to assign and allot unto and for the said *Robert Carter* and his successors, rectors of the said parish of *Waddingham cum Snitterby* aforesaid, such parcel or parcels of the said arable fields, commons, pastures, and carrs, within the said township of *Snitterby* (except the common pasture called the *Carrside*), so directed to be inclosed as aforesaid, as should in the judgment of the commissioners, or any two of them, be equal in value to, and a full satisfaction for, the present glebe lands of the said rector, within the last-mentioned lands and grounds so to be inclosed; and then to assign and allot unto and for the said *Robert Carter* and his successors, rectors as aforesaid, such parcel or parcels of the residue of the same arable fields and common pastures and carrs in *Snitterby* aforesaid; and also all the titheable parts of the said township of *Waddingham*, as should (quantity, quality, and situation considered) contain or be equal in

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value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of, and as a full recompense and compensation for, all the tithes, dues, duties, and payments whatsoever belonging to the said rector, and arising, and renewing, or happening, or which might arise, renew, or happen, within the same lands and grounds; and further, to assign and allot unto and for the said *Robert Carter* and his successors, rectors as aforesaid, such parcel or parcels of the said arable fields of *Snitterby* aforesaid, as by the commissioners, or any two of them, should (quantity, quality, and situation considered) be adjudged to be equal in value to the tithes of the ancient inclosed lands in *Snitterby* aforesaid. The act further directed allotments to be made in the *Carr-side* pasture, equal in value to two-fifteenth parts of the titheable grounds (quantity, quality, and situation considered), to the rector of *Waddingham cum Snitterby*, and the vicar of *Bishop Horton*, according to their respective shares and interests in the tithes of the said *Carr-side* pasture. And it was further enacted, that, within six calendar months next after the commissioners, or any two of them, should have completed the division and allotments thereby directed to be made, or as soon after as conveniently might be, they should form and draw up their award or instrument in writing, which should express distinctly and separately the quantity in statute measure of the acres, roods, and perches, contained in the said fields and grounds thereby directed to be set out and assigned; and also the situation, abuttals, and boundaries of the several parcels and allotments respectively by them set out and assigned; and also the situation, abuttals, and boundaries of each and every of the respective townships of *Atterby*, *Snitterby*, and *Waddingham*; and should contain orders and directions as to the repair of the fences, ditches, gaps, stiles, and bridges, and also all such other orders, regulations, and determinations as were in and by

the act directed or authorized to be made; and all such other orders, regulations, and determinations, as should be necessary or proper to be inserted in the said award, conformable to the tenor and purport of the said act, or for the completing and maintaining the said division and inclosure; and that the said award should, within six calendar months after the execution thereof, be enrolled by the clerk of the peace of the division of *Linsey* in the county of *Lincoln*; and that the several allotments and divisions, and all orders, directions, regulations, and determinations, so to be made as aforesaid, and declared in and by the said award, should be binding and conclusive unto and upon all the parties interested; and that immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues and duties, and payments of what nature or kind soever, arising, renewing, increasing, payable, or happening, within or out of the lands or grounds thereby directed to be inclosed, or within the said ancient inclosed lands or ground, or otherwise howsoever (except such surplice fees and other payments as were before excepted), and all right of common, right of stray, and right of average, upon the said lands and grounds thereby directed to be inclosed, and every of them, should cease, and for ever be extinguished. By the act, an appeal to the Quarter Sessions of the Peace was given to any person who might think himself aggrieved by any thing done in pursuance of the act—the appeal to be within six calendar months after the cause of complaint, other than and except such orders and determinations of the commissioners as in the act were declared to be final and conclusive: and the Justices were required to hear and determine the matter of such appeal; which determination of the said Justices should be final and conclusive to all parties concerned, and should not be removed by *certiorari* or any other process whatsoever, into any of the Courts of *Westminster*. The act contained the following saving clause: “ Saving

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always to the King's most excellent Majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her, or their heirs, successors, executors, and administrators, other than and except the respective persons to whom any allotment or allotments of land or compensation shall be made by virtue of this act, in respect of the interest or property for which such allotment or compensation shall be made, all such estate and interest as they, every, or any of them, had and enjoyed, of, in, to, or in respect of, the said fields, common pastures, carra, and waste grounds, or any of them, before the passing of this act, or could or might have had or enjoyed, in case the same had not been made; but no such other person or persons, bodies politic or corporate, his, her, or their heirs, executors, administrators, or successors, shall have power to disturb any of the allotments to be made in pursuance of the act, but shall accept their respective allotments which shall be made in lieu of the lands, common right, tithes, or other interests, which he, she, or they would have been entitled to, in case this act had not been made."

The commissioners appointed by the act, duly proceeded to make a division and allotment of the several lands and grounds thereby directed to be divided and inclosed; and on the 29th November, 1770, duly made and executed their award in writing concerning the same, which award was duly enrolled according to the provisions of the act. By this award, the commissioners assigned unto *Robert Carter*, and his successors, for the time being rectors of *Waddingham cum Snitterby*, as follows:—Three several plots or parcels of ground, containing together 51 acres, 1 rood, 30 perches, statute measure, which they declared to be in lieu of, and as a compensation for, all the said *Robert Carter's* ancient glebe lands and right of common in the said *north-carr*, *south-carr*, and *carr-side* pasture, and the *ace-field* in *Waddingham*

aforesaid. These allotments were figured in the margin of the award, under the head of "*Waddingham* allotments," "*Glebe* allotment." At the conclusion of the *Waddingham* allotments, on the sixteenth sheet of the award, there was a marginal note by the commissioners, *viz.* "Here end the *Waddingham* allotments;" and immediately after was the following marginal note, *viz.* "*Snitterby* allotments begin here." In the sixteenth sheet of the award, in the margin, under the head "*Snitterby* allotments, allotment to the rector in lieu of glebe," the commissioners assigned to the said *Robert Carter*, as rector of *Waddingham cum Snitterby*, two several plots or parcels of ground, containing together 83 acres, 3 roods, 32 perches, which they declared to be in lieu of the glebe lands and right of common belonging to the said *Robert Carter*, as rector as aforesaid, and also in lieu of an ancient inclosure or piece of glebe land, given by him in exchange to *John Richardson*. The commissioners then assigned to the said *Robert Carter*, as rector of *Waddingham cum Snitterby*, five several plots or parcels of ground, containing together 223 acres, 1 rood, 31 perches, statute measure, which 223 acres, 1 rood, 31 perches, (quantity, quality, and situation considered) they adjudged to be in lieu of, and as a full recompense and compensation for, all the tithes, dues, duties, and payments belonging to the said *Robert Carter*, as rector aforesaid, within the open fields, common pasture, and carrs in the townships of *Snitterby* and *Atterby*, aforesaid. The commissioners also assigned unto the said *Robert Carter*, and his successors, rectors of *Waddingham cum Snitterby*, one plot or parcel of ground, containing 17 acres, 2 roods, statute measure, which (quantity, quality, and situation considered) they adjudged to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*. At the end of the *Snitterby* allotments was a marginal note by the commissioners, as follows, *viz.* "Here end *Snitterby* allot-

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ments." The commissioners then assigned unto the Rev. *George Jolland*, and his successors, for the time being rectors of *Atterby* aforesaid, a certain allotment in lieu of glebe, certain allotments amounting together to 125 acres, 3 roods, 26 perches, statute measure, which (quantity, quality, and situation considered) contained, or were equal in value to, two full fifteenth parts of the arable fields, common pastures, and carrs, in *Atterby* aforesaid; and they adjudged the same to be in lieu of, and as a compensation for, all the tithes, dues, duties and payments of the said *George Jolland*, within the said arable fields, common pastures, and carr grounds, in the said several townships of *Atterby* and *Snitterby*, except as in the said act excepted; and also certain allotments in lieu of tithe of old inclosure in *Atterby* and *Snitterby* aforesaid. The lands allotted in *Snitterby*, under the act, amounted to 1533 acres, 17 perches, and, deducting the allotment for the glebe, 33 acres, 3 roods, 32 perches, there remained 1499 acres, 25 perches, two-fifteenths of which would be 199 acres, 3 roods, 32 perches. The lands allotted as aforesaid to the rector in *Snitterby*, amounted to 223 acres, 1 rood, 31 perches, leaving an excess of 23 acres, 2 roods, 9 perches, above the 199 acres, 3 roods, 22 perches. The lands allotted in the township of *Waddingham*, under the act, amounted to 1281 acres, 1 rood, 36 perches, and, deducting the allotment for glebe, and rector's right of common, 51 acres, 1 rood, 30 perches, and for a gravel pit, 1 acre, 2 roods, there remained of lands in that township 1228 acres, 2 roods, 6 perches, two-fifteenths of which would be 163 acres, 3 roods, 8 perches. The lands allotted in the township of *Atterby*, under the act, amounted to 846 acres, 3 roods, 28 perches, and, deducting the allotment for glebe, 13 acres, there remained of lands in that township, 833 acres, 3 roods, 28 perches, two-fifteenths of which would be 111 acres, 29 perches. The lands allotted to the rector amounted to 125 acres, 3 roods, 26 perches, leaving an excess of 14 acres, 2 roods, 37 perches, beyond the 111

acres, and 29 perches. There were 888 acres, 16 perches, allotted to proprietors of lands in *Waddingham*, who had no allotments made to them in *Snitterby*. There was not in the award, any order, direction, regulation, or determination of the commissioners, as to the tithes of the lands in the township of *Waddingham*, inclosed by virtue of the act, or any part thereof, unless any thing above stated amounted thereto.

One of the witnesses for the plaintiff in error, on his cross-examination, stated, that the land which the rector of *Waddingham cum Snitterby* had, was of good fair quality, and lay together convenient. He got forty acres of carr land, much better than the uninclosed land, which had not been mowed for seven years.

The Lord Chief Justice told the Jury that he was of opinion that the matters produced and given in evidence by the plaintiff in error, were sufficient to entitle him to maintain his action. The Jury found a verdict for him, for 4*l.* 18*s.* debt, damages, one shilling; whereupon a bill of exceptions was tendered to and sealed by his Lordship. The questions proposed for the consideration of this Court, now were:—Whether the defendant in error, as rector of the parish and parish church of *Waddingham cum Snitterby*, had not been compensated for all tithes payable to him as rector, under the inclosure act of 1769, and the award made by the commissioners in pursuance of the act: and whether, under the act and award, all tithes payable to the defendant in error, as rector, were not extinguished: and whether the several allotments and compensations which the rector had received, by virtue of the inclosure-act and award, were not in lieu of all tithes payable to the rector.

The case came on for argument on a former day in this Term, when—

Mr. *Brodrick* for the plaintiff in error, submitted, that sufficient appeared upon the face of the award to satisfy the

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Court, that the rector had received an adequate compensation for the tithes in *Waddingham*, although lands in that parish were not expressly awarded to be allotted to him in lieu of such tithes. This question has been argued before the Master of the Rolls, who was of opinion that the award operated as an extinguishment of the tithes (a). But in *Cooper v. Walker* (b), where an action was brought under an order of the Lord Chancellor (c), the Court of *King's Bench* held, that, under the award, the commissioners had not made any allotment to the rector, in lieu of such tithes, and that the rector's right was reserved to him by the saving clause in the act; and Lord Chief Justice *Abbott* said, that that clause was not adverted to, when the case was before the Master of the Rolls. The same question, however, has been raised before two different tribunals, and the decisions are contradictory and conflicting. It certainly was the object and intention of the Legislature in passing the act in question, to extinguish all tithes in *Waddingham*, and to give the rector a compensation by allotments in lieu thereof. The award having been made and acquiesced in by the rector for so great a length of time, every intendment must be made in its favour. A Court in reviewing the judgment of a legitimate tribunal, is bound to presume *omnia rite acta*. By the act of Parliament, the commissioners were empowered to allot such parcels of the arable fields and common pastures within the township of *Snitterby*, and of the township of *Waddingham*, as should (quantity, quality, and situation considered) contain, or be equal in value to, two-fifteenth parts of the titheable places of those lands. Now, if the rector obtained his two-fifteenths of both these townships, it was immaterial to him where those lands were situate, provided that in quantity and quality they were a full compensation for the tithes;

(a) See *Cooper v. Thorpe*, 1 6 Dowl. & Ryl. 81.
 Swanst. 92.

(c) See 2 Russell, 78.

(b) 4 Barn. & Cress. 36, S. C.

and the deficiency in quantity might have been compensated for by the quality. Besides, if the rector had been dissatisfied with the award, he had a right of appeal; and, as he did not exercise it, it must be assumed that he was satisfied with the decision of the commissioners. Further, the act directs that, immediately after the enrolment of the award, all manner of tithes arising, &c., within or out of the lands directed to be inclosed, shall cease and for ever be extinguished. This, therefore, is, of itself, a complete bar to the rector's claim, and his right to tithes is altogether destroyed. But it is said, that such right is reserved to him by the saving clause in the act. That clause, however, applies only to persons other than those to whom allotments or compensations should be made; and if the rector has had an allotment in lieu of the tithes in *Waddingham*, he comes within the exception, and is barred by the statute; and coupling the act with the award, it is quite clear, that the latter was intended to operate on all the tithes in the parish of *Waddingham*, and if the saving clause be deemed to be inapplicable as far as it regards the rector, the decision of the Master of the Rolls is founded on principle, and ought to be confirmed.

Mr. Serjeant *Adams, contra.*—The commissioners were bound by the act to allot to the rector of *Waddingham*, lands in *Waddingham*, in lieu of his tithes there; or, in other terms, to allot to him lands in each of the townships, in lieu of his tithes in each respectively; for they were directed to allot to him such parcel or parcels of the arable fields, common pastures, and carrs within the township of *Snitterby*, and also the titheable parts of the township of *Waddingham*, as should (quantity, quality, and situation considered) be equal in value to two-fifteenths of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full compensation for, all the tithes belonging to the rector, and arising *within*

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the same lands and grounds. Now, the allotment in lieu of tithe having been made for the tithes of the township of *Atterby* and *Snitterby* only, is not a bar to the rector's claim for the tithes of *Waddingham*; and the allotment of land in *Waddingham* is expressed to be in compensation of glebe and right of common only. The award, therefore, not containing a compensation for the whole tithe, is not such as the act required; and the existence of such an award is a condition precedent to the operation of the act in extinguishment of the right to tithes. As, therefore, the commissioners have omitted to make any allotment to the rector in lieu of his tithes in the township of *Waddingham*, the allotment to him in *Snitterby* cannot be intended to include a compensation for the tithes in *Waddingham*; for otherwise there will be 888 acres of land allotted to persons in *Waddingham* who had no allotments made to them in *Snitterby*, and for the tithes of which the rector has not received any compensation, nor any allotment in respect thereof. The allotment in *Snitterby* shews that it was not intended to be a compensation for all the tithes; for, if it had been, it should have consisted of 364 acres, whereas, in fact, it only consisted of 223 acres, and the quality was not so superior as to render a smaller quantity of the one equal in value to a larger quantity of the other. Then, if the rector has received no allotment in lieu of his tithes in *Waddingham*, there is nothing in the act of Parliament to bar his right. Although in *Cooper v. Thorpe*, the Master of the Rolls was of opinion that the rector was barred, yet it must have arisen from the circumstance that the saving clause was not adverted to, or its effect considered. That clause saves the rights of all persons "other than and except the respective persons to whom any allotment of land or compensation shall be made, by virtue of that act, in respect of the interest or property, for which such allotment or compensation shall be made;" and, as the award gives the rector no allotment or compen-

nation in respect of his estate and interest in the tithes in *Waddingham*, his right to them is saved, and he is consequently not barred by the statute.

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Mr. *Brodrick*, having been heard shortly in reply,

The Court took time to consider, and—

Lord Chief Justice BEST, on this day, after stating the facts found by the special verdict, delivered judgment as follows:—

Any compensation for the tithes of *Waddingham*, however inadequate, would extinguish the right of the defendant in error, because the amount of compensation was to be decided by the commissioners. If the commissioners had erred by giving too little, their error could only be corrected by an appeal; and the rector for the time being not having appealed to the sessions, his claim and those of his successors would have been for ever barred. But the record states, “that there is not in the award, any order, direction, regulation, or determination of the commissioners, as to the tithes of lands in the township of *Waddingham*, inclosed by virtue of the act, or any part thereof, unless any thing above stated amounts thereto.” It is clear that nothing previously stated amounts to an award of compensation for any of the tithes of *Waddingham*; for all the allotments are made as compensation for other claims which are stated in the award. This is an answer to the argument, that the commissioners, considering *the situation, quantity, and quality of the land allotted to the rector*, might think his allotment a full compensation for all the rights belonging to his rectory. We have been asked to presume that the commissioners must have awarded compensation for these tithes, from the length of time that has elapsed, during which no tithes have been claimed for the lands in *Waddingham*.

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This presumption is repelled by the express terms of the award. It is perfectly clear, that, if a claim for compensation for the tithes of *Waddingham* was made to the commissioners, such claim was disallowed. The authority the act gives to the commissioners is, *to assign and allot to the rector such parcels of lands as they should consider to be a full satisfaction of his different rights*. All the rights to be compensated are enumerated. The commissioners are not authorized to decide what rights are to be compensated, but only to ascertain the amount of compensation for the rights specified in the act. With regard to the tithes of *Waddingham*, the Legislature has not permitted the commissioners to judge what compensation shall be made for them. The statute says the compensation for these tithes shall be two-fifteenths of the titheable lands in *Waddingham*; and the commissioners have only to ascertain what (*quality, quantity, and situation considered*) amounts to two-fifteenths of the titheable lands in this township.

The commissioners, not having made any compensation for the tithes of *Waddingham*, must either have rejected a claim which they were directed to compensate, or, from inadvertence, have omitted to make compensation for it. In the first case, they have exceeded their authority; in the second, they have omitted to do what they were expressly required to do. In either view of the case, their award is void as to all such interests as are affected by their exceeding their jurisdiction, or by their omission. A party is not concluded by not appealing against a nullity.

It is probable that the allotments made to the several owners of titheable lands in *Waddingham*, are made in the same proportion as they would have been if an allotment had been made to the rector for tithes. The owner of each allotment has the land which should have been awarded to the rector for the tithes of his allotment. If so, the only effect of this decision will be, that the rector,

who has not been compensated for his tithes, will have the tithes, and the land-owners, who are to pay the tithes, will have amongst them the lands which should have been allotted to the rector as a compensation for his tithes. But it has been insisted, that, after the enrolment of the award, all tithes shall cease and be extinguished. If there were no other clauses in the act to control the terms of this section, it could not by any legal construction be made to extinguish tithes in a township of the parish of which no notice is taken. As to the tithes of that township, it is no award. But there is a clause which saves the rights of all persons, except such persons to whom compensation shall be made in respect of *the interest or property for which such compensation shall be made*. If any man has any interest or property, for which no compensation is made, his interest is reserved to him in the same state in which it was before the act passed. It cannot be argued, that, because the rector has compensation for one part of his rectory, his right in another part of his rectory, for which it is clear that nothing has been allotted to him, shall not be protected by this clause. The clauses are consistent with each other, and effect must be given to both. Where any compensation is made, and the party does not appeal, he cannot afterwards complain of the inadequacy of the compensation, and his rights are extinguished by the first clause. If property be omitted out of the award, it is not touched by the first clause, and the rights of the owner are saved by the second. This we should be bound to hold, even if our decision produced injustice; for we cannot reject a clause in the act which is reconcileable with the other parts of it. But the decision which we are called upon to pronounce, accords with the justice of the case to be decided. The rector ought not to be deprived of tithes, for the giving up of which he has had no compensation. Awards made under acts of Parliament are governed by the same rules as apply to

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awards made on the submission of individuals. A private act is regarded only as the deed of the parties bound by it; and when such an act appoints arbitrators, it is the submission of those parties. If an award goes beyond the submission to the arbitrators, it is *pro tanto* void. If it omits to decide on any thing within the scope of the submission, the interest of the parties remains in the state in which it was before the award was made. In *Ravee v. Farmer* (a), the reference was “of all matters in difference:”—it was held, by the Court of *King’s Bench*, that the parties might, after an award made on this submission, shew that there were matters, which, not being brought under the consideration of the arbitrators, were not decided by them, and were therefore not affected by the award. Indeed, this rule is not confined to awards; for, although a declaration contains counts under which the plaintiff’s entire demand might be recovered, yet, if no attempt has been made to give evidence of some of the claims, they may be recovered in another action. This was decided in *Seddon v. Tutop* (b); and that decision has been confirmed by subsequent cases in the *King’s Bench* and *Common Pleas*. Upon these principles, the defendant in error is entitled to maintain his action for not setting out the tithes at *Waddingham*, and the judgment of the Court of *King’s Bench* must be—

Affirmed.

(a) 4 Term Rep. 146. (b) 6 Term Rep. 607; S. C. 1 Esp. Rep. 401.

END OF TRINITY TERM.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN MICHAELMAS TERM,

IN THE NINTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

IN the course of this Term, *vis.* on the 18th *November*, *James Parke*, of *Lincoln's Inn*, Esq., was called to the degree of Serjeant-at-Law, on being appointed one of the puisne Judges of the Court of *King's Bench*, in the room of Mr. Justice *Holroyd*, who resigned in the last vacation. He gave rings with the motto:—" *Tenax justitiæ*," and took his seat in Court on the same day.

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Shortly after the Term, *Thomas Denman*, Esquire, Common Serjeant, received a patent of precedence.

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Friday,
Nov. 7th.

LONG v. PRESTON.

In an action for the breach of a warranty of a horse, the plaintiff failed to prove a warranty at the time of sale, but it appeared that he had returned the horse to the defendant, who stated that he would keep it without prejudice, but he afterwards used it and offered to sell it to a third person:—*Held*, that, by so doing, he rescinded the original contract of sale; and, the Jury having found a verdict for the plaintiff, for the sum paid for the horse, the Court refused to disturb it.

THIS was an action of *assumpsit* for the breach of a warranty of a horse. At the trial, before Lord Chief Baron *Alexander*, at the last Assizes for the county of *Norfolk*, the plaintiff proved that he had purchased the horse of the defendant, and paid him 35*l.* for it. That, shortly afterwards, the plaintiff wrote to the defendant, complaining of the unsoundness of the horse, but, on the production of the letter, its terms seemed to impute an unsoundness after the sale rather than before. The defendant returned an answer, stating that he had never warranted the horse; on which the plaintiff returned it to him, and he immediately ordered it to be sent back to the plaintiff, which was done. The plaintiff returned it to the defendant a second time, when he stated that he would keep it without prejudice, and that each party should stand on his own rights; but it appeared that the defendant afterwards rode the horse once or twice, and also offered it for sale to a third person. The plaintiff having failed in proving a warranty, the Lord Chief Baron left it to the Jury to say, whether, under the circumstances, the defendant had not rescinded the original contract by using the horse, and offering to sell it after it had been returned to him a second time. They found in the affirmative, and gave a verdict for the plaintiff, for 35*l.*, the sum he paid for the horse. Leave however was reserved to the defendant, to move the Court to set aside the verdict and enter a nonsuit, in case they should be of opinion that the plaintiff, having failed to establish a warranty at the time of the sale, was not entitled to recover.

Mr. Serjeant *Wilde*, now applied accordingly, and submitted, that as the plaintiff had failed in proving a warranty of the horse by the defendant, either before or at the time

of the sale, he could not be entitled to recover, as the action was founded on the breach of such warranty. Besides, the defendant sent back the horse to the plaintiff, immediately on its being returned; and when the plaintiff sent it back a second time, the defendant was not bound to return it again, as he said he should keep it without prejudice, and that each party should stand on his own rights. If, therefore, the defendant could have sold the horse and obtained a good price for him, it would not only have been for the plaintiff's benefit, but prevented any further dispute or litigation between the parties; and as the defendant knew that he had never warranted the horse, he did not rescind the original contract by endeavouring to sell it, nor did his merely using it once or twice amount to a waiver of the previous bargain or sale.

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Lord Chief Justice BEST.—I am of opinion that this question is concluded by the finding of the Jury. There can be no doubt but that, under the circumstances, it was properly left to them to consider, whether, in the absence of proof of a warranty by the plaintiff, the defendant had not, by his own acts, rescinded the original contract of sale. It was proved, that, after the plaintiff had returned the horse to the defendant a second time, he not only rode it, but attempted to sell it; he thereby exercised acts of ownership over it, and, if he had consented to take it back, there can be no doubt but that he was bound to refund to the plaintiff the sum he had originally paid for it. The defendant, by acting as he did, put an end to the previous bargain; and, although he might have said, that the horse was to be kept without prejudice, yet he acted otherwise, as he not only used it, but actually offered it for sale.

Mr. Justice PARK.—The question was most properly left to the Jury, whether, independently of a warranty, the defendant had not rescinded the original contract by

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using the horse, and actually offering it for sale after it had been returned to him a second time by the plaintiff; and their verdict appears to me to be not only right, but conclusive of the question—

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule refused.

Saturday,
Nov. 8th.

EGREMONT, Earl, Demandant; —, Tenant; VALE and CROOKE, Vouchees (a).

One of two vouchees became insane after he had executed a joint warrant of attorney, but before the perfecting of the recovery—The Court allowed it to pass as to all the parties except him.

MR. Serjeant *Stephen*, on a former day in this Term, moved that this recovery might pass as of this Term, although it was intended that it should have been perfected in *Michaelmas* Term, 1826. The learned Serjeant founded his motion on an affidavit, which stated, that *Vale*, one of the vouchees, was of sound mind when he executed the warrant of attorney in 1826; that shortly afterwards he became a lunatic, and that he was still insane; and the case of *Lang*, demandant; *Lee*, tenant; *Woodhouse*, vouchee (b), was referred to, for the purpose of shewing that it is no objection to the passing of a recovery, that the warrants of attorney of several vouchees are given on separate pieces of parchment; and here, although the warrant of attorney was executed by the two vouchees jointly, and one of them had since become a lunatic, it was no objection to the passing of the recovery;—or the difficulty might be obviated, by the other vouchee's executing a separate warrant of attorney in his own name alone. It was also sworn, that all the parties were alive and con-

(a) See the case of *Walcott*, vouchee, 3 Bing. 423, where, the vouchee having become insane between the time of executing the

warrant of attorney and the perfecting of the recovery, the Court would not allow it to pass.

(b) 1 Bos. & Pul. 31.

senting to the application, with the exception of the lunatic.

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EGREMONT,
Demandant.*Cur. adv. vult.*

Lord Chief Justice BEST now referred to the case of *Jameson*, plaintiff; *Fletcher*, deforciant (a), and said, that, as one of the vouchees had become a lunatic since he executed the warrant of attorney, the recovery might pass as to all the parties except him, because, if he had continued of sound mind, or had been restored to reason, he might have revoked his authority at any time before the recovery was perfected; and he cannot be said to be *consenting* at the time of its passing.

Fiat, as to all the parties but the lunatic.

(a) JAMESON, Plaintiff; FLETCHER and Wife and Others, Deforciants.

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MR Serjeant *Storks* moved that this fine might pass, notwithstanding one of the deforciants had become a lunatic.

The Court ordered it to pass as to all the other parties, notwithstanding the omission in the proceedings of the name of *George Evans*, he being a lunatic*.

One of several deforciants having become insane, the Court ordered the fine to pass as to all the other parties, notwithstanding the omission of the name of the lunatic in the proceedings.

* Idiots, lunatics, and generally all persons of weak understanding and non-sane memory, are incapable of levying fines or suffering recoveries; and the statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to levy a fine, although, if they be allowed to do so, the fine cannot be afterwards re-

versed by an averment that the consors laboured under any of those disabilities; because, the record and judgment of the Court being the highest evidence in the law, the consors must be presumed to have been capable of contracting at the time. The same reasoning applies to a recovery.

1828.

Saturday,
Nov. 8th.

GULLY and Others v. The BISHOP of EXETER, and
DOWLING, Clerk.

In *quare impedit*, the father of the defendant, in support of the claim of the latter to present, was called as a witness, when, it appearing that he was tenant by the curtesy, his late wife having been seised of an estate of inheritance, his testimony was rejected, although it was insisted that he could have no interest in the event of the suit, his right to present (if any) having lapsed, more than six months having expired since the vacancy happened—for, if the bishop neglect or omit to present within the six months, the party originally entitled has still a right to present.

In a deed of 1672, by which the fourth turn

to present to an advowson was conveyed, the considerations were stated to be “the sum of twenty shillings paid to the grantor by the grantee, and for true and faithful service done unto the former by the latter; as also, for divers other good and valuable causes and considerations him (the grantor) thereunto moving:”—*Held*, in the absence of all proof of fraud, that the pecuniary consideration (regard being had to the date of the deed) must be presumed to be a *valuable* consideration.

An answer in *Chancery*, by a mortgagor, to a bill of foreclosure filed by the mortgagee, is not admissible in evidence, the mortgagor having conveyed his interest in the estate to another, twenty years before the answer was filed, and the person to whom the estate was conveyed, being no party to the mortgage, or to the proceedings in equity.

THIS was a *quare impedit* (a). The plaintiffs were devisees in trust, under the will of *William Slade Gully*, deceased, and claimed title to present a clerk to the rectory of *Berrynarber*, in the county of *Devon*, under a grant dated the 29th April, 1672, to *Lewis Stevings*, from one *Robert Isaac*, who was then seised in fee of the fourth turn of the advowson, and to which turn the avoidance, at the time of the commencement of this suit, belonged. The defendant *Dowling* claimed as tenant in tail under a deed of settlement, executed by the above-named *Robert Isaac*, on his marriage with one *Elizabeth Skiffe*, in 1692. They had issue one daughter, who became seised on the death of her father and mother, and afterwards married one *Humphrey Pike*. *Pike* and his wife died, leaving one *Robert Pike*, their eldest son, who intermarried with one *Rebecca Lovering*. They both died, leaving *Elizabeth*, the wife of *John Dowling*, their eldest daughter, and *Rebecca*, the wife of one *John Creedy*, their second daughter, their heirs: whereupon, *Dowling* and his wife, in right of his wife, and *Creedy* and his wife, in right of his wife, became seised, and, on the death of the wife of *John Dowling*, her estate descended to the defendant, as her eldest son and heir-at-law, who now claimed to present.

(a) See the pleadings and arguments on a motion to strike out se-

veral of the pleas, and to amend the declaration, *ante*, p. 105.

At the trial, before Mr. Justice *Park*, at the last assizes at *Exeter*, the above-named *John Dowling*, the father of the defendant, was called as a witness, when his testimony was objected to, as, his wife being seised of an estate of inheritance, he was tenant by the curtesy, and had an immediate interest in the result of the suit; as, if the defendant obtained a verdict, the witness would be entitled to a writ to the Bishop, under the statute of *Westminster* the 2nd, c. 30, and claim a right to present (a). The learned Judge, thinking the objection to be well founded, excluded *Dowling's* testimony. The defendant, among several other documents, offered in evidence a bill and answer in *Chancery*, the answer purporting to have been made by *Robert Isaac*, and put in to a bill of foreclosure filed against *Isaac* by one *Breere*, a mortgagee, twenty years after the conveyance to *Stevings*, in 1672, under which the plaintiffs claimed; but, it appearing that *Stevings* had died previously to the answer being filed, and he being no party to the proceedings, the learned Judge refused to receive it. The defendant having been confined by his pleas to disputing the validity of the deed of 1672, which was in fact the only question in the cause, pleaded that it was fraudulent and void as against subsequent purchasers. On its being produced in evidence, the considerations were stated as follows, *viz.* "in consideration of the sum of twenty shillings paid to *Robert Isaac* by one *Lewis Stevings*, and for true and faithful service done unto the said *Robert Isaac* by the said *Lewis Stevings*; as also for divers other good and valuable causes and considerations him the said *Robert Isaac* thereunto moving:" whereupon it was objected,

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(a) By that statute, the Judge at *Nisi Prius* has power to give judgment immediately; yet, if he do not, upon the return of the

postea, judgment may be given by the Court to which the return is made. Buller's *Nisi Prius*, by Bridgman, 7th Edit. 124.

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for the defendant, that the deed was void, being without consideration, and fraudulent as against subsequent purchasers, under the statute 27 *Elix.* c. 4. The learned Judge left it to the Jury to say, whether the consideration of "twenty shillings," coupled with "true and faithful services, and other good and valuable considerations," as expressed in the deed, was not a sufficient consideration; and, generally, whether the instrument was fraudulent or not. He also left it to them to consider, whether the subsequent deed of settlement made by *Isaac*, on his marriage in 1692, was not made in fraud of the deed of 1672. They found both points in the affirmative, and gave a verdict for the plaintiffs.

Mr. Serjeant *Merewether* now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, and submitted, in the *first* place, that the testimony of the defendant's father was improperly rejected; for, although he was tenant by the curtesy, and might at one time have had an interest in the event of the suit, still that interest had long since expired, and was now absolutely destroyed, more than six months having elapsed since the vacancy, during which period alone he had a right to present. Therefore, the record in this cause could never be used in evidence either for or against him, as, where a party has only a right to present to a fourth turn, and neglects to do so, it is more than probable that a century would elapse before any interest could return to him. Besides, *caveats* had been duly entered, so that all his rights were actually and to all intents extinguished. *Secondly*, although the answer in *Chancery* by *Isaac* was not filed until some years after he had conveyed the purparty to *Stevings*, yet, as *Isaac* was a party to the proceedings as well as to the mortgage deed, which might have been executed previously to the grant, the answer ought to have been read, particularly, as both the plain-

tiffs and defendant claimed under *Isaac* alone; and although it might be considered as *res inter alios*, yet as *Isaac* himself was the mortgagor, the answer might have explained the nature of the deed of grant or conveyance to *Stevings*, or shewn that the mortgage had been made previously thereto. *Lastly*, the deed of 1672 was void, not on the ground of the inadequacy of the consideration or moral fraud, but because there had been no valuable consideration. It is clear that, on principle, there was no consideration at law to support it, and, being without consideration, it was fraudulent under the statute of *Elizabeth*, as against subsequent purchasers. The consideration of "twenty shillings" was merely nominal, and was so considered at the trial; and although it was coupled with "true and faithful service done," it would be too much now to assume that such service had ever been performed. The true, nay, the sole question for the consideration of the Jury, was, whether the deed of 1672 was granted on a good consideration, and not whether the subsequent deed of settlement of 1692 was made in fraud of the former deed. That instrument was void upon the face of it for want of consideration; and the Jury were mis-led by having their attention called to the deed of 1692, the only point in issue between the parties being the validity of the original deed of conveyance by *Isaac* to *Stevings* in 1672. No parol or extrinsic evidence was admissible to set up that deed, or affect its validity. It never appeared to have been acted on, and the party conveying considered it to be a nullity, and given without consideration, as twenty years afterwards he executed another deed, *viz.* the deed of settlement on his marriage, which had the effect of completely defeating or annihilating the first. In *Doe d. Otley v. Manning* (a), it was held that a voluntary settlement of lands was void as against a subsequent purchaser for a valuable consideration, al-

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(a) 9 East, 59.

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though there was no fraud in the transaction: and in *Comyn's Digest* (a) it is said, that "a bargain and sale, for divers causes and considerations, without money, is not good, though it be recited by the indenture, that the bargainee was bound by recognizance or obligation for the bargainor. So, if a man bargain and sell land, in consideration of a marriage before had, or *service done*, it is not sufficient." Now, here, it did not appear that any service had ever been done, or that there was any previous contract by the party to perform it, which, at all events, should have been shewn. As, therefore, the pecuniary consideration of twenty shillings is merely nominal, though coupled with other good and valuable considerations, their meaning is vague and uncertain; and, if so, the deed of 1672 must be considered as a mere voluntary deed, and the only point to which the attention of the Jury ought to have been directed was, whether or not, upon the face of it, enough appeared to shew it to have been granted on a good or valuable consideration.

Lord Chief Justice BEST.—Two objections have been raised to the verdict which has been found for the plaintiffs, and in support of the application for a new trial. The first objection is, that the testimony of *John Dowling*, the father of the defendant, was improperly rejected. But, on his being tendered as a witness, it appeared that he was tenant by the curtesy. He had a derivative title in right of his wife, who claimed to be seised of the inheritance which descended to her from *Robert Isaac* under the deed of settlement of 1692, under which the fourth turn, to which the defendant now claims a right to present, is alleged to have been conveyed. The proposed witness, therefore, had a direct interest in the result of the cause. If the party claiming under the deed of settlement had a right to present, the defendant's father might and ought to have presented

(a) Tit. *Bargain and Sale*, B. 11.

when he became possessed of the fourth turn, as the fruits were then his; for, on the death of his wife, he was entitled to hold during his life, as tenant by the curtesy. It is, therefore, unnecessary to consider whether the record in this case would be evidence either for or against him. Besides, if the plaintiffs had been defeated in establishing their right, nothing could deprive the witness of his right to present. Although it has been said, that, if he had any interest, it has long since ceased, more than six months having elapsed since the vacancy, to which period his right to present was restricted; yet, the right of the party entitled to the turn would not be barred until the bishop had taken it upon himself to present. It is only in case of default of the party that the right is in the bishop; and, if he do not present, it devolves on the archbishop or metropolitan, and, if he neglect or omit to do so, the right vests in the King, as supreme patron, by virtue of his prerogative. But, as neither of these parties acted strictly on their rights, the witness was not prevented from presenting, although the six months had elapsed (a). He, therefore, had a direct interest in the event of the suit, and was, consequently, most properly rejected. *Secondly*, it has been said, that the deed of 1672 was voluntary, and without consideration, and, therefore, void as against subsequent purchasers. In the case of *Doe d. Watson v. Routledge* (b), Lord Mansfield held, that, in order to render a voluntary settlement void against a subsequent purchaser, within the meaning of the statute of *Elizabeth*, it must be covenous and fraudulent, not voluntary only; and, although, in the subsequent case of *Doe d. Otley v. Manning*, it was decided, that, if a settlement of lands be purely voluntary and without consideration, as if made *in consideration of natural love and affection*, it is void as against a subsequent purchaser who

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(a) See Watson's Clergyman's Law, 3rd Edit. 113, 114.

(b) Cowp. 705.

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claims under a deed made for a *good and valuable* consideration; yet, the ground on which the Court there decided, was, that the law would, in such a case, infer fraud upon the true construction of the statute, as the law alone is to judge as to what shall be fraud and covin as arising out of facts and the intentions of the parties. Here, however, the presumption that the deed was founded on a mere voluntary consideration fails, as it is in part founded on a pecuniary consideration, and that, too, coupled with "true and faithful service done, and divers other good and valuable considerations." Although the latter words may be treated as surplusage or mere ornament, yet there was no evidence adduced to shew that the service had not been performed, or that there were no other good considerations for granting the deed. If, indeed, the sum of *twenty-shillings*, as expressed on the face of the deed, had been clearly nominal, as, in cases of small sums, *viz.* five or ten shillings now usually alleged to have been paid by trustees, or in like instances, it might not have been an adequate consideration; but, considering that the deed was executed more than one hundred and fifty years ago, and regard being had to the fluctuation and depreciation in the value of money since that period, it would be too much for us to say that twenty shillings was at that time nothing than a mere nominal consideration, or that it might not be the value of the fourth share in an advowson from which the purchaser might never derive any benefit. It has been further said, that, if a person bargain and sell land in consideration *of a service done*, it is not a sufficient consideration; and *Comyn's Digest* has been referred to in support of that position: but that learned writer does not lay it down as an express authority, or that it was his own positive opinion, for he states it under a *semble*, and refers to *Dallison's Reports* (a), and if the case cited from that book be looked at, it is quite clear

(a) Page 18.

that it applies to mere gratuitous or voluntary services, which are not the subject of legal obligation. It has been further said, that some previous contract for the performance of the service should have been shewn; but we must now presume that the service done was a valuable service, and performed on an adequate consideration; and that the purparty or fourth part conveyed by the deed of 1672, was an equivalent for the considerations expressed in the conveyance. With respect to the answer in *Chancery*, I am clearly of opinion that it was not admissible in evidence, as it was not filed until twenty years after the mortgagor had conveyed the purparty to *Stevings*, and it did not appear that *Isaac* was ever in possession after that conveyance; and as the object of the answer was to defeat the title of the purchaser under it, there was no pretence for its being put in.

Mr. Justice BURROUGH.—We are no strangers to this case, as it has come before us in a variety of shapes, and the only issue between the parties from the first, was, in whom the title was vested, so as to give a right to present to the rectory in question. I am clearly of opinion, that, as soon as it appeared that the party tendered as a witness on behalf of the defendant was tenant by the curtesy, his testimony was properly rejected, he having an interest in respect of the property claimed. As to the deed of 1672, I think the pecuniary consideration of twenty shillings amply sufficient, of itself, without inquiring into the nature of the service done, or the other considerations mentioned in the deed. It is enough, if there be an apparently substantial consideration; and we are not to estimate the value of money one hundred and fifty years ago. Twenty shillings might have been a considerable sum in those days, and not a mere nominal consideration, such as is now introduced into deeds as having been paid by trustees and others, and which is mere matter of form. With re-

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spect to the answer in *Chancery*, there was no pretence for receiving it in evidence; and, although it has been said that the question as to the deed of 1672 was improperly left to the Jury, yet they had all the facts before them, and it is impossible for us to say that they have not exercised a sound discretion.

Mr. Justice GASELEE.—I am clearly of opinion that there is no ground to disturb this verdict. As to the rejection of the witness, he was actually the person who would be entitled to present, in case a verdict had passed for his son, who was in fact the only real defendant on the record; for, although he claimed title to present under the settlement, yet, as his father was tenant by the curtesy, the right still remained in him, he having an interest during his life. Although it has been said, that the six months had expired during which the witness had a right to present, yet if a living come to a bishop by lapse, and he does not take advantage of it, the party originally entitled may still claim to present. As to the objection raised to the deed of 1672, it appears to me that the sum of twenty shillings therein expressed, was not a mere nominal consideration, but might have been the value of the property conveyed, and this may be inferred from the order in which it stands. It forms the prominent and leading consideration; and this cannot be assimilated to a deed made for mere natural love and affection; and although it is coupled with service done, and other good and valuable considerations, yet it seems to be the primary and substantial consideration: and considering the time when the deed was executed, and that only a fourth part of the advowson was conveyed, and that no evidence was given at the trial of its then annual value, I think it would be too much for us now to say that there was no adequate or valuable consideration. With respect to the answer in *Chancery* to the bill of foreclosure, as it was not filed until twenty years after the

conveyance to *Stevings*, such answer must have been made about the time of the deed of settlement under which the defendant claims; it would, therefore, be too much to set it up in opposition to such a conveyance, when the instrument appears, on the face of it, to have been made for a pecuniary and other good and valuable considerations; and *Stevings*, to whom the purparty was conveyed, was no party to the mortgage, or to the proceedings in the Court of *Chancery*. Although it has been said, that the only question which ought to have been left to the Jury was, whether or not the deed of 1672 was granted on a good or valuable consideration, yet as they had all the evidence before them, and no objection was raised as to the summing up or direction of the learned Judge at the trial, we ought not now to interfere.

Mr. Justice PARK.—I left the question of fraud wholly to the Jury, and stated, as fully as possible, every material circumstance from which fraud might be presumed. I confess I was strongly impressed in favour of the plaintiffs; and although some observations to that effect might have escaped me, a full and intelligent special Jury felt no hesitation in delivering their verdict, and no objection was raised as to the mode in which I left the question, as to the construction of the deeds, for their consideration, although it is now said I mis-directed them on that point.

Rule refused.

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SAME v. SAME.

In *quare impedit*, the declaration alleged that *R.* died seised in fee of an advowson, and intestate; that it descended to his four daughters and co-heirs, whereupon their husbands, in right of their wives, became seised; and that, whilst they were so seised, the church became vacant; that because they did not agree, the husband of the eldest daughter, in right of his wife, presented; and that the fourth daughter and her husband died so seised of the one-fourth part of the wife of and in the advowson, after whose death the fourth part descended to the son and heir of the wife:—

Held, that the seisin of the latter was correctly stated, although it was objected, in arrest of judgment, that it was not alleged, that the fourth daughter was seised of a fourth part before her death, or that there had been a previous partition by the coparceners.

THE declaration having alleged that *Roberts* died seised in fee of the advowson of the rectory, and intestate, and that, after his death, it descended and came to his four daughters and co-heirs, whereupon their husbands, in right of their wives, became and were seised of the same advowson; and that, whilst they were so seised, the church became vacant, whereupon it belonged to the husbands, in right of their respective wives, to present; but that because they did not agree among themselves jointly to present, it belonged to the husband of the eldest daughter, and his wife, in right of his wife, to present, for the vacant turn, being the next and first avoidance after the death of *Roberts*; whereupon they presented accordingly: that the first turn descended to the son of the daughter of the eldest daughter; the second turn to the son of the second daughter; the third turn to the son of the third daughter, and from him to his two daughters; and the fourth turn to the son of the *fourth daughter*: that she and her husband died so seised of *the same one fourth part* of her, the wife, of and in the said advowson; after whose death, the same purparty or fourth part descended and came to *Robert Isaac*, as son and heir of the said fourth daughter, and under whom the plaintiffs claimed.

Mr. Serjeant *Merewether*, moved in arrest of judgment, on the grounds that it was not alleged that the mother of *Robert Isaac* was seised of a fourth part of the advowson before her death, as it was merely averred that the advowson descended to the four daughters of *Roberts*, and that, they and their husbands not agreeing jointly to present, it belonged to the eldest daughter and her husband, in right of his wife, to present; and that they presented ac-

cordingly. That presentment was made on the first avoidance after the death of *Roberts*, and it is no where stated that the fourth daughter became seised of the fourth part of the advowson. Neither is it alleged that there had been any previous partition by the four daughters and their husbands, as co-parceners, but merely that the turns to present descended to them; and, without an actual partition, *Robert Isaac*, the son of the fourth daughter, could not be said to be seised of a purparty or fourth part, as he was seised of the whole jointly with the other co-parceners. In the *Second Institute*, it is said (a), “ By the common law, if an advowson descends to divers co-parceners, if they cannot agree to present, the eldest sister shall have the first turn, and the second the second turn, *et sic de ceteris*, every one in turn, according to seniority; and this privilege extends not only to their heirs, but to the several assignees of every co-parcener, whether he hath the estate of them by conveyance, or by act in law, as tenant by the curtesy, he shall have the same privilege by presenting in turns as the sisters had; therefore, albeit the co-parceners do make composition to present by turn, this being no more than the law doth appoint, *expressio eorum quæ tacite insunt nihil operatur*; therefore, they remain co-parceners of the advowson, and the inheritance of the advowson is not divided: and notwithstanding this composition they may join in a *quare impedit*, if any stranger usurp in the turn of any of them; and the sole presentation out of her turn did not put her sister out of possession, in respect of the privity of estate, no more than if one co-parcener taketh the whole profits.” It, therefore, should have been alleged in the declaration, that, because the four sisters did not agree jointly to present, the fourth or youngest became seised of one fourth part of the advowson; that she afterwards died so seised of the same one fourth part; and that, after her

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death, the fourth turn descended to *Robert Isaac*, her son and heir. The declaration therefore cannot be supported.

Lord Chief Justice BEST.—As it was alleged, that, after the death of *Roberts*, the advowson descended and came to his four daughters and co-heirs, the wives of four persons named in the declaration, and that, whilst they were so seised in right of their wives, the church became vacant, and that, the four co-parceners not agreeing jointly to present, it belonged to the husband of the eldest daughter, and his wife, in right of his wife, to present, and that they did so; that the first, second, third, and fourth turns to present, descended to the issue of the four daughters respectively; and that the fourth daughter died seised of her one fourth part; and that after her death, the fourth turn descended to *Robert Isaac*, as her son and heir—I am of opinion, that such allegation was sufficient, and that the seisin of *Isaac* could not have been stated otherwise.

Mr. Justice GASELEE.—The advowson descended to the four daughters of *Roberts*, as co-parceners, and it is averred, that, whilst they were seised, the church became vacant; that the husband of the eldest daughter, and his wife, in right of his wife, presented to the vacant turn; that the fourth daughter died seised of her fourth part; and that, after her death, it descended to *Robert Isaac*, as her son and heir. This appears to me to be the correct mode of stating the seisin of *Robert Isaac*; and there is, consequently, no ground for the objection raised in arrest of judgment.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurring—

Rule refused.

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MACKIE v. WARREN.

THE plaintiff obtained judgment against the defendant in this suit, for 262*l*. He some time afterwards caused him to be apprehended on a criminal charge, and, having kept him in custody from *Saturday* until the *Monday* following, he abandoned the charge; and there being no foundation whatever for it, he paid the defendant all costs arising from his apprehension and detention; but, immediately on his being set at liberty, he caused him to be arrested on a writ of *capias ad satisfaciendum* founded on the above judgment, under which he was now detained in the custody of the sheriffs of *London*. Under these circumstances—

The Court refused to discharge out of custody a defendant taken under a *ca. sa.*, on the ground that he had been illegally apprehended, and detained in custody at the suit of the plaintiff on a groundless criminal charge, after judgment obtained, the costs of the defendant's apprehension under which the plaintiff had paid.

Mr. Serjeant *Ludlow* applied for a rule *nisi*, that the defendant might be discharged out of such custody, and submitted, that, as the plaintiff had caused the defendant to be taken and detained under criminal process, from which he was discharged, on the ground that there was no foundation for the charge, it must be considered in law as a discharge and satisfaction of the original debt, and more particularly so, as the plaintiff had the defendant taken into custody and confined by his own tortious or fraudulent act, and he thereby precluded himself from obtaining any remedy he might otherwise have resorted to under the *ca. sa.* If the defendant had been discharged out of execution after he had been taken by virtue of that writ, it is quite clear the plaintiff could not resort to the judgment again, or charge the defendant's person in execution, and he ought to be equally protected after a discharge from criminal process. It was formerly doubted, whether, if a person were taken in execution, and set at liberty by privilege of either house of Parliament, the party at whose suit such execution was pursued was not for ever after barred and disabled from suing forth a new writ

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of execution, but this was remedied by the statute 2 *Jac.* 1, c. 13, s. 2. So, if a person taken on a *ca. sa.* died in execution, it was once held, that the plaintiff had no further remedy; but that difficulty was obviated by the statute 21 *Jac.* 1, c. 24. Although, if a party taken on a *ca. sa.* escape, or be rescued, the plaintiff may sue out a new execution; yet that cannot apply to a case where the defendant has been taken by the fraudulent act of the plaintiff: and here, the plaintiff must be supposed to be cognizant of the consequences of his own unlawful act, the object of which was to keep the defendant in custody on a charge for which there was not the slightest foundation, in order to afford the plaintiff an opportunity of causing the writ of *ca. sa.* to be executed, under which the defendant is now detained.

Lord Chief Justice BEST.—I am of opinion that there is no pretence for this application. It has been truly said, that, if the defendant had been discharged after having been arrested on a *ca. sa.*, he could not have been taken in execution again for the same debt; but that can only apply to a case where he had been regularly taken in the first instance; but, if there be an irregularity in the first process, a defendant may be taken on a second writ; and here, the plaintiff has been punished for suing out the criminal process improperly and without foundation, as he has paid the defendant all the costs attending his caption and detention in custody under it.

Mr. Justice PARK.—It appears to me that the plaintiff was entitled to take the defendant in execution under the writ of *ca. sa.*, not only by law, but on principle. No authority has been, or indeed can be referred to, to shew us that he is entitled to his discharge; for, when the plaintiff found that he had caused him to be apprehended and detained wrongfully in the first instance, he made amends by the payment of all the costs attending such act.

Mr. Justice GASELEE.—The true principle is, that, if a party once regularly charged in execution be discharged, he cannot be afterwards taken for the same debt; and here, if it could be shewn that the plaintiff caused the defendant to be apprehended, for the sole purpose of serving him with the writ of *ca. sa.*, and that both processes were issued at the same time, there might be some ground for presuming fraud; but the plaintiff has been sufficiently punished by the payment of the costs attending the defendant's detention under the criminal charge.

Rule refused.

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COX v. BENT and Others.

THIS was an action of replevin for taking the plaintiff's goods, in a place called The *Newcastle Brewery*. The defendants (among several other avowries) alleged that the plaintiff, for the space of one year next before and ending on the 25th *March*, 1827, and from thence until the said time when &c., held and enjoyed The *Newcastle Brewery* as tenant thereof to the defendants, by virtue of a demise to the plaintiff theretofore made, at and under the yearly rent of 450*l.*, payable half yearly, on the 25th *March* and 29th *September*, and that, because the sum of 450*l.* of the rent aforesaid, for the said space of one year, ending as aforesaid, was due and in arrear from the plaintiff to the defendants, they well avowed the taking, &c.

Pleas in bar—*non-tenuit*, and *riens en arriere*.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Stafford*, it appeared that the plaintiff was in the occupation of the premises, which he held under a written agreement bearing date the 7th *December*, 1824, by which the defendants, as executors of one *Ward*, agreed to let and demise the brewery to the plaintiff, in

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A party entered into possession of premises under an agreement for a lease, at a certain rent, and occupied them more than a year, but paid no rent. An account was afterwards delivered to him by the landlord, charging him with half a year's rent, the amount of which he at first disputed, but admitted that half a year's rent was due, and named the amount, and the account was altered accordingly:—*Held*, that a yearly tenancy might thereby be implied, and that the landlord had a right to distrain.

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consideration of the yearly rent of 450*l.*, and of the covenants and agreements to be entered into by the plaintiff in a certain indenture of lease to be executed on or before the 29th of *September* then next ensuing, and which was to contain a covenant by the defendants, to procure a new cooler, and be at the expense of setting it up, &c. &c. It also appeared, that the plaintiff had paid no rent, but that an account had been rendered to him by the defendants' clerk, in which the first item was, "half a year's rent 250*l.*," upon seeing which, the plaintiff said that it had been overcharged 25*l.*, whereupon the clerk altered it to 225*l.* There were several other items in the account to which the plaintiff also objected. Under these circumstances, the learned Judge was of opinion, that, as the plaintiff raised no objection to the sum alleged to be due for rent, after the account had been altered by the clerk, by reducing it to 225*l.*, it amounted to such an assent as to support the avowry, alleging a tenancy from year to year, at the yearly rent of 450*l.*, payable half yearly, although the agreement contained no stipulation as to the periods at which the rent was to be payable. The Jury accordingly found a verdict for the defendants on that avowry, leave being reserved to the plaintiff to move to set it aside, and that a verdict might be entered for him, in case the Court should be of opinion that there was not sufficient evidence to support the avowry.

Mr. Serjeant *Russell* now applied accordingly, and submitted, that there was no evidence of a demise to entitle the defendants to distrain; and he relied on the case of *Dunk v. Hunter* (a), where it was held, that a landlord has no right to distrain, unless there be an actual demise to the tenant, at a fixed rent; and that, if an instrument only

(a) 5 Barn. & Ald. 322.

amounts to an agreement for a future lease, and no lease has been executed, and no rent paid subsequently to the agreement, the landlord is not entitled to distrain; and Mr. Justice Bayley referred to the case of *Morgan d. Dowding v. Bissell* (a), as establishing the rule, that, although there are words of present demise, yet, if it can be collected on the face of the instrument, that it is the intention of the parties to give a future lease, it shall be considered an agreement only. It is quite clear, that, in this case, the agreement was not meant to operate as a present demise; and although in *Knight v. Bennett* (b), where a party entered on a farm under an agreement for a lease, for a term of years, and, although the time of paying rent was settled, it did not appear what the amount was to be, and the lease was never executed, the Court held, that the landlord might distrain; yet there, the tenant occupied according to the terms of the proposed lease, and *paid a certain rent* for two years; whilst here, the plaintiff had paid no rent, but merely assented to a certain item, as altered by the defendant's clerk, in a disputed account: nor did it appear on the face of the agreement itself, that the rent reserved was to be payable half-yearly.

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Lord Chief Justice BEST.—As the plaintiff assented to the alteration made by the defendant's clerk, as to the amount of the sum due for the half year's rent, I am of opinion, that it was evidence from which a tenancy from year to year might be implied, and consequently that this case falls within the principle established in *Knight v. Bennett*.

Mr. Justice GASELEE.—I thought, at the trial, that, as the plaintiff raised no objection to the alteration made by

(a) 3 Taunt. 65.

(b) 3 Bing. 361; S. C. 11 B. Moore.

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the defendant's clerk as to the amount of the sum due for the half year's rent, which constituted the first item in the account, it was equivalent to a payment of rent, and was of itself sufficient to raise a presumption of a tenancy from year to year.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurring—

Rule refused.

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PROCTOR v. BRAIN.

It is the duty of a sworn broker of the city of London, to charge his principal only the cost price of articles purchased for him, in addition to his commission, and the principal having averred in an action of *assumpsit*, that the broker had charged him a greater price than the cost price, which the plaintiff had paid:—*Held*, that it was sufficient proof of such averment, to produce a running unsettled account between the parties, by which it appeared that the principal had paid more than the amount of the over-charges, although on the whole account, and when the balance at a subsequent period was struck, the principal was indebted to the broker in a sum far exceeding such over-charges.

THIS was an action of *assumpsit*. The first count of the declaration stated—That, in consideration that the plaintiff, at the special instance and request of the defendant, would retain and employ the defendant, as a broker, to purchase for the plaintiff divers large quantities of wines and spirits, for certain reasonable commission and reward to be paid by the plaintiff to the defendant in respect thereof, he, the defendant, undertook and faithfully promised the plaintiff to charge him the *cost price* of all such wines and spirits as he, the defendant, should from time to time purchase for the plaintiff. The plaintiff then averred, that he employed the defendant as such broker, and that, although he did purchase on account of the plaintiff, divers large quantities of wine and spirits, to wit, &c., and although the cost price of the said wines and spirits amounted to a certain large sum of money, to wit, &c., yet that the defendant, not regarding, &c., but contriving, &c., *did not nor would charge the cost price*, but, on the contrary, charged a much larger and greater price, by which the plaintiff was obliged to, and *actually had paid a much larger price* than the cost price.

The second count stated, that the defendant undertook to charge the plaintiff for such wines and spirits as he purchased on his account, as cheap a price as he himself from time to time should pay for them, but that he charged a greater price, which the plaintiff had been obliged to pay.

To these were added the common money counts.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that the defendant was a sworn broker of the city of *London*, and the bond given by him for the due performance of his office as such, according to the statute 6 *Anne*, c. 16, s. 4 (a), was given in evidence. The plaintiff also proved, that he employed the defendant, as such broker, to make large purchases of wines and spirits for him, and that he had charged higher prices than he had paid for them, in addition to his commission, and which over-charges were made in the year 1825, and the month of *January*, 1826. It further appeared that there was a current account between the plaintiff and defendant, from 1825 to 1827; and a book or ledger was put in by the plaintiff, by the entries in which it appeared, that, at the close of the year, 1825, there was a balance against him to the amount of 785*l.*; that, in the course of the year 1826, payments were made by the plaintiff to the defendant, in cash and bills, to the amount of 2,072*l.*: but that, at the end of *December*, in that year, there was still a balance against him of 359*l.* On this proof, it was contended for the defendant, that the plaintiff must be nonsuited, as he had alleged in his declaration, that he had employed the defendant as his broker,

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(a) By which it is enacted, "that all persons who shall act as brokers within the city of *London*, and liberties thereof, shall from time to time be admitted so to do by the Court of Mayor and Al-

dermen of the said city, for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable."

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to buy for commission, and that the defendant had promised to supply him at the cost price, but had charged a higher or *greater price* than the cost price, which the plaintiff had been obliged to and *had actually paid to the defendant*; and there was no evidence of such payment, inasmuch as, the defendant not having claimed of the plaintiff the balance which was due on the whole account, the plaintiff could not be said to have overpaid the defendant on the previous items; and as the plaintiff might deduct the amount from the balance, if the defendant claimed it of him, it could not amount to payment. For the plaintiff, it was insisted that the balance of 785*l.*, owing by him to the defendant, at the close of the year 1825, had been, in point of law, extinguished by the payments made in 1826, which were shewn to have exceeded 2000*l.*, according to the well known principle, established in *Clayton's case (a)*, and since universally recognized and adopted, that, in the absence of a declaration by either debtor or creditor, as to the application of indefinite payments, the law made the appropriation according to the priority in which the debts were incurred, and that, if any other appropriation were to be made, it was incumbent on the creditor to declare his intention at the time of payment. His Lordship refused to nonsuit the plaintiff, he being of opinion, that the sum of 2,000*l.* paid by him in the course of dealing with the defendant in 1826, might be applied in liquidation of the particular items proved to have been overcharged by the defendant in 1825, and *January* 1826; and he said, that, if the defendant considered it to be unjust, he might either apply to a Court of equity, or to this Court, to stay execution until the real balance could be ascertained. The Jury found a verdict for the plaintiff for 119*l.* the amount of the prices proved to have been overcharged, leave being reserved to the defendant to move to set aside

(a) 1 Meriv. 605.

the verdict and enter a nonsuit, in case the Court should be of opinion, that the account produced in evidence was not sufficient to establish the allegation of payment in the declaration.

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Mr. Serjeant *Taddy* now applied accordingly, and submitted that the plaintiff had produced no evidence of the payment by him to the defendant of a higher price than the cost price, as alleged in the special counts. The principle established in *Clayton's* case, and which was recognized and adopted in *Bodenham v. Purchas* (a), does not apply to the present, as the balance of account was always against the plaintiff; and, as it was merely struck at the end of each year, it was one continuing account; and as Mr. Justice *Bayley* said, in *Bodenham v. Purchas*, "where the accounts are treated as one entire account by all parties, the rule does not apply." Here, there has been no actual settlement between the parties from the time of the first employment; and until the plaintiff had paid the balance due to the defendant, the latter might either have deducted the over-charges, or allowed the plaintiff to set them off; and the case of *Goddard v. Cox* (b), established the principle, that, where there are several demands, the party paying may, *at the time of payment*, apply the money to which debt he thinks proper, but that, if he does not do so, the receiver may apply it as he pleases. So in *Bloss v. Cutting* (c), where the defendant owed money on two bonds, and paid money on account, but gave no directions to which of the bonds he would have it applied, it was determined that the plaintiff had the election.

The Court most strongly recommended that the account between the parties should be referred to an arbitrator, as the plaintiff would be prejudiced by the delay which

(a) 2 Barn. & Ald. 45.

(b) 2 Str. 1194.

(c) *Ib*, n.

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must necessarily arise by proceeding in a Court of equity, and that the judgment and execution for the sum found by the Jury might be stayed until the amount should be ascertained: but the defendant having refused to accede to these terms—

Lord Chief Justice BEST said, that he felt much surprised, at the trial, that the defendant should have allowed the question to come before the public. The plaintiff employed him in his character of broker, to make purchases on his account, and the defendant undertook to charge him only the cost price of the articles purchased. Indeed, he was bound to do so, as one of the regulations in the bond given by the defendant to the Court of *Aldermen* for the due performance of his office as broker, in pursuance of the statute 6 *Anne*, c. 16, s. 4, was, that “no broker shall demand, receive, or take, any larger sum of money than the amount of the usual brokerage or commission;” and he is bound to purchase at as cheap a rate as he can; and if he fails in either of these particulars, he is immediately liable to an action at the suit of his principal. It was clearly proved at the trial, that, in the year 1825, and the commencement of 1826, the defendant charged the plaintiff higher prices than he purchased the wines and spirits for, varying in some instances from 1*d.* to 3*d.* *per* gallon, and in others from 2*l.* to 3*l.* *per* pipe. In every one of these instances the defendant violated his duty as a broker; and the plaintiff was no party to these illegal transactions. I am, therefore, of opinion, not only that the Jury have found a proper verdict, but that there is no ground to disturb it, either at law or in equity.

Mr. Justice PARK.—This case has been moved on the ground that this is a fair account between the parties, whereas, the overcharges made by the defendant were founded in fraud, and the plaintiff is consequently entitled

to recover on the special counts of the declaration. The allegation of the payment of the greater price may be considered unnecessary, as the basis of the action is the defendant's having charged the plaintiff a higher price for the wines purchased for him, than the cost price.

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Mr. Justice BURROUGH.—The defendant has not only violated his contract with the plaintiff, but rendered himself amenable to an action at his suit, in every instance where he charged him more than the cost price.

Mr. Justice GASELEE.—The only real question is the amount of the damage the plaintiff has sustained by the over-charges in question. That the defendant has broken his contract repeatedly there can be no doubt, and he might either have been indicted for a fraud, or for having obtained the plaintiff's money under false pretences.

Rule refused.

HENMAN v. DICKENSON.

THIS was an action by the plaintiff, as the indorsee, against the defendant, as the acceptor of a bill of exchange. The declaration alleged that one *George Potter*, on the *29th February, 1828*, made his bill of exchange in writing, *bearing date the day and year aforesaid*, and directed it to the defendant, requesting him, three months after the date thereof, to pay to *Potter*, or his order, the sum of *49l. 17s. 6d.*, for value received. The plaintiff then averred, that the defendant accepted the bill, and that *Potter* indorsed it to him the plaintiff.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, on the production of the bill, the date appeared to have been altered, and

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In an action by the indorsee against the acceptor of a bill of exchange, the date of which appeared to have been altered by the drawer after acceptance, it is incumbent on the indorsee to shew that the alteration was made previously to the indorsement, or before the bill was parted with by the drawer.

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the wife of *Potter*, the drawer, having been called to prove the circumstances under which the alteration was made, she stated that the bill was originally dated and drawn on the 22d *February*, and that it was accepted by the defendant on that day. That, about a week afterwards, her husband altered the date in her presence, from the 22d to the 29th of *February*;—when it was objected for the plaintiff, that she was incompetent to prove this fact, as it would tend to criminate her husband by shewing that he had been guilty of a forgery. His Lordship was of opinion that it was incumbent on the plaintiff to prove that the alteration was made before the bill was parted with by the drawer, or previously to its having been indorsed by him to the plaintiff; and no evidence having been adduced to that effect, the Jury found a verdict for the defendant, leave being reserved the plaintiff to move to set it aside, and that a verdict might be entered for him, in case the Court should be of opinion that the holder of a bill with an altered date is not bound to shew that the alteration was made before it was sent into the world, or negotiated.

Mr. Serjeant *Taddy* now applied accordingly.—The wife of the drawer was at all events an incompetent witness, to shew that the date of the bill had been altered by her husband after the acceptance by the defendant, according to the principle established in the case of *The King v. The Inhabitants of Cliviger* (a), viz. that a husband and wife cannot be permitted, from a principle of public policy, to give any evidence that may *even tend* to criminate each other; and that the objection is not confined merely to cases where they are directly accused of a crime; but, even in collateral cases, if their evidence tends that way, it cannot be admitted. That was a case of settle-

(a) 2 Term Rep. 263.

ment, where a marriage in fact had been proved between two paupers, and it was held, that the first wife of the husband was not a competent witness to prove a former marriage with him, because such evidence would shew that he had been guilty of bigamy. So, here, the alteration of the date by the drawer after acceptance, not only had the effect of vacating the bill, but of rendering the party liable to a prosecution for forgery.

[Mr. Justice *Park*.—The rule laid down in *The King v. The Inhabitants of Cliviger*, appears to have been lately much discussed in the case of *The King v. The Inhabitants of All Saints, Worcester* (a), in which the Court of *King's Bench* was of opinion, that it had been expressed in terms much too general and undefined.]

Although the Lord Chief Justice was of opinion at the trial, that it was necessary for the plaintiff, as the holder and indorsee of the bill, to prove that it had not been negotiated or indorsed by the drawer previously to its being altered, it was incumbent on the defendant to prove that the alteration was made since the acceptance, and without his assent; and it must be now assumed, that the bill had not been negotiated previously to the alteration, as it is impossible for an indorsee to know or ascertain the fact, at what time, or under what circumstances the alteration was made.

Lord Chief Justice *BEST*.—It appears to me to be unnecessary to decide the first point, as to whether the wife of the drawer was a competent witness to prove the circumstances attending the alteration of the date of the bill by her husband. If it were, I should require time for consideration, as the authority of the case of *The King v. The Inhabitants of Cliviger*, seems to have been doubted by the Court of *King's Bench*. But I am of opinion, that, if, upon the production of a bill of exchange, the date appears

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(a) Phillipps on Evidence, 5th Edit. Vol. 1, 79. MS. E. T. 1817.

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to have been altered, the holder, or party producing it, must prove either that the alteration was made before the bill was issued or negotiated, or that the party sought to be charged upon it assented to such alteration.

Mr. Justice PARK.—Where the holder or indorsee sues on a bill of exchange, the date of which, upon the face of it, appears to have been altered, it is necessary for him to shew when the alteration was made. This appears to me to be consistent with good sense, because the acceptor cannot be aware of the circumstances attending an alteration made by the drawer or any other party after he has put his name to the bill.

Mr. Justice BURROUGH, and Mr. Justice GASLER, concurring—

Rule refused.

(a) In Bayley on Bills, 4th Edit. 95, it is said, that, if the date of a bill appear upon production to have been altered, and such alteration is in the hand-writing of the acceptor, the holder must prove that such alteration was made before the bill was parted with by the drawer:—but proof that it was in the drawer's hands after it was accepted, will be *prima facie* evidence for that purpose. And the case of *Johnson v. The Duke of Marlborough*, 2 Stark. Rep. 313,

is cited in support of that proposition. So, in *Downes v. Richardson*, 5 Barn. & Ald. 674; S. C. 1 Dow. & Ryl. 332. Bayley on Bills, 94, it was held, that an accommodation bill, altered in its date previously to its being negotiated with the consent of the parties, does not require a new stamp, as such bill cannot be considered as issued until it is in the hands of some person who is entitled to treat it as a security available in law.

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ANNE EDWARDS v. FAREBROTHER and Others.

THIS was an action of trespass against the defendants, as Sheriff of *Middlesex*, and several others, one of whom was a judgment creditor of a person of the name of *Salmon*, for breaking and entering the plaintiff's house, and seizing her furniture.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, it appeared, that the defendant had seized the furniture in question under a writ of execution against the goods of *Salmon*; that he rented the house in which the seizure was made; and that the plaintiff, Mrs. *Edwards*, had lived there with him for some years in a state of concubinage; but that she had passed as his wife; and that both parties had represented themselves as being married; and that a child of theirs had been christened and entered in the register as if it had been born in wedlock. The plaintiff proved that part of the goods seized formerly belonged to her mother, and were bequeathed to her at her death, and that they were afterwards valued at 22*l.*; but she did not shew what portion of them was in the house at the time of the seizure. For the defendants, it was contended, that a woman who lives with a man, and passes herself off as his wife, cannot recover in trespass for taking her goods under an execution in a house in which they cohabited, because, by her own conduct, she had induced the world to believe that they were the property of the man with whom she lived, and whom she had represented as her husband; and the case of *Mace v. Cadell* (a), was relied on, to shew, that, after a woman had declared she was married, and that goods were the property of her husband, in her right, she could not afterwards say that she was not married to him, and that the goods were

Quære, Whether a woman who cohabits with a man, assumes his name, and represents herself as his wife, can maintain trespass against a Sheriff for taking in execution furniture alleged to be her property, but being in the house in which the parties resided? But, it having been left to the Jury to say, whether, under the circumstances, the property might not have been given up by the woman to the man, during cohabitation, and they having found in the affirmative, the Court refused to disturb the verdict.

(a) Cowp. 232.

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her sole property. For the plaintiff, the case of *Edwards v. Bridges* (b), was relied on, where, in an action by the same plaintiff against the Sheriff of *Middlesex*, under circumstances nearly similar to the present, Mr. Justice *Abbott* (now Lord *Tenterden*) was of opinion, that, in point of law, the circumstance of the plaintiff's having lived with *Salmon* as his wife, and having answered to his name, did not render the goods liable to an execution against him, and therefore, that the only question was as to the value of the goods. The Lord Chief Justice was strongly inclined to think that the principle laid down in *Mace v. Cadell* was founded on a good and moral rule, and stated that he should have nonsuited the plaintiff, but for the case of *Edwards v. Bridges*; but he left it to the Jury to say, whether the property in the house at the time of the seizure was the plaintiff's, and whether, under the circumstances, it might not have been given up by her to *Salmon* during the continuance of their cohabitation. The Jury found a verdict for the defendants.

Mr. Serjeant *Taddy*, now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, and submitted that the case of *Edwards v. Bridges*, was decisive of the question, and that the case of *Mace v. Cadell*, was distinguishable, as there the question arose between a bankrupt and his assignees, and here, if *Salmon* had become bankrupt, his assignees might probably have been entitled to the goods, under the statute 21 *Jac.* 1, c. 19, s. 11, as being in the possession or disposition of the bankrupt at the time of his bankruptcy. But the case is very different in an action against the Sheriff for a *tort*. If he seize goods as belonging to a particular person, it is incumbent on him to shew that he has taken the goods of the party against whom the execution issued, and, if he do not, he is liable to an action of trespass, and

(b) 2 Stark. Rep. 396.

here, the only question that should have been left to the Jury, was, whether the plaintiff was or was not the wife of *Salmon*, at the time of the seizure: if not, the goods were clearly hers, and she was, consequently, entitled to maintain this action.

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Lord Chief Justice BEST.—I certainly was strongly inclined, at *Nisi Prius*, to adopt the principle established in *Mace v. Cadell*, which appears to me to be sound law, and laying down a moral rule which ought not to be departed from. But as Lord *Tenterden* was stated to have entertained a different opinion in the late case of *Edwards v. Bridges*, I refused to nonsuit the plaintiff, but left it to the Jury to say, whether, as *Salmon* was proved to have rented the house, the furniture found in it at the time of the seizure, although part of it might once have belonged to the plaintiff, had not been given up by her and become the property of *Salmon*; and it is but fair to presume that she had done so during the time of her adulterous intercourse with him. Besides, the plaintiff proved that the goods which belonged to her at the death of her mother, were worth only 22*l.*, and it did not appear what part of them were in the house at the time of the seizure. As, therefore, the value now must be under 20*l.*, and as the Jury have found that they were not the property of the plaintiff, I am of opinion that their verdict is conclusive, and ought not to be disturbed.

Mr. Justice PARK.—I am of opinion that the question in this case was most properly left to the Jury, and as the value of the goods was under 20*l.*, their verdict cannot be disturbed; but I confess I am not prepared to accede to the doctrine laid down in *Mace v. Cadell*, or to apply it to a case like the present, as there the only question was, whether the property in the goods passed to the assignees of a bankrupt, under the statute of *James*.

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Mr. Justice GASELEE.—In the late case of *Batthews v. Galindo* (a), this Court decided, and, I think, properly, that a woman who lives with a man, and passes as his wife, is a competent witness on his behalf, in an action brought against him, as the mere circumstance of cohabitation only goes to her credit and not to her competency. I there referred to *Mace v. Cadell*, which I stated to be sound law, and that I had lately acted upon it in the case of *Griffiths v. Franklin*; and I still continue of the same opinion. But, as the question in this case was properly left to the Jury, and the value of the goods claimed by the plaintiff to be her property could not exceed 20*l.* in value, it would be too much for us to disturb this verdict.

Rule refused (b).

(a) 1 Moore & Payne, 565.

(b) See *Quick v. Staines*, 1 Bos. & Pul. 293, S. C. 2 Esp. Rep. 657, where it was held, that, if an executrix use the goods of her testator as her own, and afterwards

marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.

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PALMER v. THOMAS.

By the statute 7 & 8 Geo. 4, c. 56, s. 15, it is enacted, that, if certain goods brought coastwise into the port of London, and which are liable to dues to the corporation, shall be landed

THIS was an action of *assumpsit* for demurrage.

At the trial, before Lord Chief Justice Best, at Guildhall, at the Sittings after the last Term, it appeared, that the plaintiff was the master of a vessel which arrived in the port of London, on the 9th February last, from Great Yarmouth, with a cargo of potatoes consigned to the de-

or unshipped before a certificate of the payment of the dues shall be obtained, such goods shall be forfeited:—*Held*, that, although it was the duty of the master of a vessel to obtain such certificate, yet, if he was prevented from so doing, by the act of the consignee, the latter is liable for demurrage in the meantime.

fendant. That the defendant had due notice of the arrival, and, as potatoes were likely to fall in price, he called on the plaintiff and desired him not to take the ship (which was then on a tier in the river) alongside the wharf where the cargo was to be discharged, as, if he did, it would get down the price. To this the plaintiff acceded, and did not, until the 18th of *February*, nine days after the arrival of the ship, obtain the necessary certificate of the payment of the dues to the corporation of *London*, as required by the statute 7 & 8 *Geo.* 4, c. 56, s. 15 (a) before the potatoes could be landed or unshipped,

For the defendant, it was contended, that, as the plaintiff had not procured the certificate, without which the ship could not be placed in a situation to discharge her cargo, he could not be entitled to claim demurrage, as the delay was occasioned by his own omission or neglect. His Lordship, however, was of opinion, that, as the defendant, as consignee of the cargo, had, in the first instance, requested the master not to go alongside the wharf, as he did not wish the arrival of the vessel to be known, as it might have the effect of depreciating the price of potatoes, he could not afterwards raise an objection as to the latter not having obtained the necessary certificate, as his omission to do so arose entirely from the act of the defendant. The

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(a) By which, for the purpose of enabling the Mayor and commonalty and citizens of the city of *London*, and their successors, to ascertain and collect the amount of the dues payable to them upon the several articles thereafter mentioned, imported coast-wise into the port of *London*:—it is enacted, “that, if all or any of the goods of the description therein-after mentioned, that is to say, firkins of butter, fish, fruit, roots

eatable, &c., &c., brought coast-wise into the port of the said city, and which are liable to the said dues, shall be landed or unshipped at or in the said port, before a proper certificate of the payment of the said dues shall have been obtained, such goods shall be forfeited, and may be seized by any officer of his Majesty’s Customs empowered to seize any goods landed without due entry thereof.”

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Jury accordingly found a verdict for the plaintiff, for 36*l.*, being the amount of his claim for demurrage from the 9th to the 18th *February*.

Mr. Serjeant *Wilde* now applied for a rule *nisi* that this verdict might be set aside and a new trial granted, on the ground, that it was the duty of the plaintiff, as master of the vessel, to put her in a proper state to deliver her cargo, before he could claim demurrage from the defendant, as consignee. He was bound to have obtained the certificate required by the statute 7 & 8 *Geo.* 4, c. 56, immediately on his arrival in the port of *London*. Although, in *Barret v. Dutton* (a), it was held, that a freighter is liable for demurrage for the detention of a vessel in port in consequence of her being frozen up; yet, as her loading was completed on the 25th *February*, and, the Custom-house being burnt down, her clearances could not be obtained till the 9th of *March* following, and a witness having stated, that it was the business of the owner to procure the ship's clearances, Lord Chief Justice *Gibbs* held, that, although the frost was no defence to an action against the freighter, yet, that he was not liable for the detention of the ship after her loading was completed, it being the duty of the owner to have obtained her clearances; and that, although this had become impossible, from the Custom-house having been burnt down, the detention in the interval must be considered as belonging to the owner and not to the freighter; and his Lordship there referred to the case of *Blight v. Page* (b), where it was decided, that, if a merchant hire a ship to go to a foreign port, and covenant to furnish a loading there, a prohibition by the government of that country to export the intended articles, neither dissolved the contract nor excused a non-performance of

(a) 4 Campb. 333. See also *Thompson v. Wagner*, Id. 335, n.

(b) 3 Bos. & Pul. 295, n.

it. Still, as the master of a ship is bound to obtain her clearances, this case falls expressly within that of *Barret v. Dutton*, and, until the certificate was procured, the plaintiff could not call on the defendant for demurrage. At all events, a mere parol conversation between the master and consignee, that the former should not take the ship alongside the wharf immediately after her arrival, did not prevent the former from procuring the certificate; and, until the vessel was in a situation to unload and deliver the potatoes, the owners or master were not exonerated from the duty imposed on them by law, of obtaining the necessary documents for the clearance of the ship and the discharge of the cargo.

Lord Chief Justice. BEST.—I still continue of the same opinion I entertained at *Nisi Prius*, and do not wish to disturb or question the authority of Lord Chief Justice Gibbs in *Barret v. Dutton*. I admit, that, generally speaking, if the owners or master of a ship do not procure the proper and necessary papers for her clearance or discharge, they cannot claim demurrage. But, if they are prevented from so doing by the act of the freighter or consignee, the latter cannot raise an objection to such claim. Here, although the plaintiff did not procure the certificate required by the statute 7 & 8 Geo. 4, immediately after his arrival, yet he was prevented from so doing by the defendant himself, who requested him not to take the vessel alongside the wharf at which the cargo was to be unloaded, as, if he did, it would deteriorate the value of the cargo, potatoes being then falling in the market. If, therefore, the plaintiff had procured the certificate, he would not have used it, and there was no evidence that the defendant ever informed him that potatoes had advanced in price, or that the ship might go to the wharf to unload, previously to the 18th of *February*, nine days after her arrival, on which day the plaintiff procured the

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certificate. He never refused to apply for it, and the vessel was kept in the river at the express request of the defendant, as he thought he might be enabled to procure a higher price for his cargo.

Mr. Justice PARK.—I am of the same opinion. My Lord Chief Justice took a most correct view of this case at the trial, and the verdict of the Jury is conclusive, and ought not to be disturbed. It has, however, been ingeniously put to us by my brother *Wilde*, that a mere conversation between the plaintiff and defendant could not exonerate the former from a duty imposed on him by law. Admitting the general rule, that it is incumbent on the owner or master of a ship to procure the necessary documents or papers for her clearance; yet, here, the conversation was given effect to by the subsequent acts of the parties, for the plaintiff left his ship in the river instead of going directly to the wharf; and it does not appear that the defendant ever applied to him to procure the necessary certificate, nor did he inform him that potatoes had risen in price, so that he might take the vessel alongside the wharf.

Mr. Justice BURROUGH.—Even admitting that the conversation between the plaintiff and defendant might not avail the former, yet it was afterwards adopted by both parties, and effect given to it at the request of the defendant himself—

Mr. Justice GASELEE concurring—

Rule refused (a).

(a) See *Hill v Idle*, 4 Campb. 327.

1828.

Tuesday,
Nov. 11th.

SEATON v. BENEDICT.

THE Court having directed that a verdict, which had been entered for the plaintiff in this suit for 18*l.* 5*s.* 6*d.*, should be set aside and a new trial granted (*a*); the cause came on to be re-tried before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term; when the same facts having been proved as were established by the evidence on the former trial, and his Lordship having left the question to the Jury in the same terms as Mr. Justice *Burrough* had previously done, as to the liability of the defendant for the articles furnished to his wife without his knowledge or assent, she having been previously sufficiently supplied by him, they found a verdict for the plaintiff, for *ten shillings*.

Mr. Serjeant *Wilde* now applied for a rule to shew cause why this verdict should not be set aside and a non-suit entered, or why his Lordship should not certify under the statute 43 *Elizabeth*, c. 6, in order to deprive the plaintiff of his costs. The learned Serjeant contended, that, as it was fully established by the evidence adduced by the defendant on both trials, that the articles furnished to his wife by the plaintiff had been delivered to her without his knowledge or assent, and that she had been previously abundantly supplied, the defendant could only be liable for such articles as he had seen her wear, and which were more than covered by the sum of 10*l.* which was paid into Court, and which the plaintiff had taken out previously to the first trial. If the defendant could be deemed liable beyond that sum, the Jury should have found a verdict for the plaintiff for the whole of his demand, as they did on the former trial; and the verdict for

In an action for goods sold and delivered to the defendant's wife, he paid money into Court generally: —*Held*, that it merely amounted to an admission of the plaintiff's right of action to the amount paid in, and that the defendant was not thereby precluded from shewing that the goods furnished were not necessary for his wife, as she had a sufficient previous supply. But the Judge, at the trial, thinking differently, the Court directed a new trial, when the Jury found a verdict for the plaintiff for ten shillings. The Judge, on application to the Court in *Banc*, certified under the statute of *Elizabeth* to deprive the plaintiff of his costs.

It seems, that, if a verdict be found for the plaintiff, the defendant cannot move the Court to enter a non-suit, unless leave be reserved at the trial.

(*a*) See *ante*, page 66.

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ten shillings is altogether unintelligible, unless it were given with a view to charge the defendant with costs. In *Montague v. Benedict* (a), the action was brought under circumstances similar to the present; and the Court of *King's Bench* made a rule absolute to enter a nonsuit, although the Jury had found a verdict for the plaintiff to the amount of his bill; and, although no point was saved at the trial;—on the ground, that, as there was no evidence to go to the Jury of any assent of the husband to the contract made by his wife, the action could not be maintained. That case is expressly in point; and, although it may be said, that there cannot be a nonsuit after verdict, if a point be not reserved for the consideration of the Court; yet, in *Hill v. Thompson* (b), which was an action for the infringement of a patent, it was left to the Jury to say whether the plaintiff had or had not made out the novelty of the invention for which the patent was taken out; and they having found a verdict for him, the Court afterwards made a rule absolute for setting it aside and entering a nonsuit, although no specific leave to do so was reserved at the trial, the Court being of opinion that the patent was void; and that the point as to the nonsuit was involved in the general consideration of the law as to the validity of the patent; and in *Gates v. Ryan* (c) Mr. Justice *Abbott* (now Lord *Tenterden*) is reported to have said, that, if a party had not leave, he could not, in strictness, move to enter a nonsuit, but could ask only for a new trial; but that, as he (the Judge) had refused to give leave on the trial, because he thought it unnecessary, the party ought to be put in the same situation as if leave had been given:—and here, as there was no evidence to go to the Jury of an assent by the husband, either express or implied, to the contract made by his wife, the plaintiff might and ought to have

(a) 3 Barn. & Cress. 631; S. C.
5 Dow. & Ryl. 532.

(b) 2 B. Moore, 458.
(c) 2 Chit. 271.

been nonsuited; and, although leave was not reserved to enter a nonsuit, yet the Court, according to the case of *Montague v. Benedict*, has a discretionary power to direct it to be now done in the terms as prayed.

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Lord Chief Justice BEST.—This verdict appears to me to be against law and justice. No application was made to me at *Nisi Prius* to reserve the point, or to move to enter a nonsuit; and I do not think it can be now done (*a*): and as I was not requested to certify, I at first doubted whether I could do so after the termination of the Sittings (*b*). But I will certify, and it will be an act of mercy to the plaintiff to do so; for, where there is a perverse or outrageous verdict, the Court would do right in granting repeated new trials, until the justice of the case be arrived at.

The rest of the Court concurring, the rule to enter a nonsuit was discharged, his Lordship stating that he would certify under the statute.

Rule discharged accordingly.

(*a*) See a note to the case of *Attwood v. Small*, 1 Mann. & Ryl. 261, where all the authorities are collected, and from which it appears, that, if no leave be reserved, a nonsuit cannot be entered after

verdict. See also Tidd's Practice, 9th Edit. 904.

(*b*) A certificate under this statute may be granted at any time after the trial. See Tidd's Practice, 9th Edit. 952.

1828.

Wednesday,
Nov. 12th.

On the 7th October the plaintiff's attorney wrote to the defendant, requesting payment of a debt, which the defendant paid to the plaintiff on the 11th, he not then knowing that a writ had been sued out. On the 16th, the plaintiff's attorney demanded costs of a writ, which not being paid, he, on the 3rd November, caused the defendant to be arrested for the debt, on a *capias* issued on the 8th October preceding. The Court ordered the proceedings to be stayed without costs.

ROOKE v. WASP, the younger.

A RULE was obtained by Mr. Serjeant *Jones*, on a former day in this Term, calling on the plaintiff to shew cause why the bail-bond which had been given by the defendant on his arrest in this action, should not be delivered up to be cancelled, and why all the other proceedings should not be set aside for irregularity, with costs, and, in the meantime, all further proceedings stayed. He founded his motion on affidavits, which stated, that, on the 2nd October last, the defendant received a letter from the plaintiff's attornies, demanding payment of the sum of 28*l.*, a debt then owing by the defendant to the plaintiff; that, two or three days afterwards, the defendant paid the plaintiff 5*l.* on account of his demand; that, on the 7th October, the defendant received another letter from the plaintiff's attornies, stating, that unless 23*l.*, the balance then due to the plaintiff, were paid, legal proceedings would be commenced against the defendant; that, on the 11th October, the defendant paid the plaintiff the sum of 23*l.*, by leaving it with his daughter at his house; that, on the 16th October following, the defendant received another letter from the plaintiff's attornies, stating, that he had settled improperly with the plaintiff, and that an officer had held a writ against the defendant for several days, and the attornies required payment of 3*l.* 12*s.* as their charge for costs; that, when the defendant paid the plaintiff the above sum of 23*l.*, being the balance due to him, he, the defendant, did not know that a writ had been issued against him; and that, on the 3rd November instant, he was arrested at the plaintiff's suit for 23*l.*, and detained in custody until he executed a bail-bond to the sheriff; and that, before he could procure his liberation, he was obliged to pay 2*l.* 19*s.* for the costs of the arrest.

Mr. Serjeant *Taddy* now shewed cause, on affidavits which stated, that the writ of *capias* under which the defendant was arrested, was sued out on the 8th *October*, to recover 23*l.*, the balance of the above sum of 28*l.*, then due to the plaintiff; and it was insisted, that, as it was not paid till the 11th *October*, being three days after the writ had been issued, and without any communication with the plaintiff's attornies, although they had made several previous demands on the defendant for payment of the debt due to the plaintiff, he ought not to be deprived of the costs of the writ, and that he had instructed his attornies to proceed accordingly.

But the Court, thinking that, under the circumstances, the plaintiff had proceeded harshly towards the defendant, ordered the proceedings to be stayed without costs on either side, and on these terms the rule was made—

Absolute (a).

(a) See *Toms v Powell*, 6 Esp. Rep. 40; *S. C. 7 East*, 536; *Swain v. Senate*, 2 New Rep. 99; *Cole v. Bennett*, 6 Price, 15, from which it appears, that, if, after writ sued

out, the defendant pays the debt without the knowledge of the plaintiff's attorney, the action may be proceeded in for the costs.

TURNER and MONTAGUE v. PRINCE.

Monday,
Nov. 17th.

THIS was an action of *assumpsit* brought by the plaintiffs, to recover from the defendant the sum of 125*l.* 9*s.* 8*d.*, alleged to be due to them for certain extra work, in the fittings up of a house, let by the former to the latter, situate in the *Regent's Park*.

The defendant was arrested for 100*l.* He paid 10*l.* into Court, and, at the trial, a verdict was taken for the plaintiffs, subject to the award

of an arbitrator, to whom the cause, and all matters in difference between the parties were referred, and the costs of the cause were to abide the event of the award. It appearing before the arbitrator that there was a disputed and complicated account between the plaintiffs and defendant, the one claiming for extra work done to a house, and the other insisting on an allowance for deviations from the mode of finishing it according to the terms of an agreement, the arbitrator directed the defendant to pay the plaintiffs 29*l.* beyond the 10*l.* paid into Court, together with the costs of the award. The Court refused to allow the defendant his costs under the statute 43 *Geo.* 3, c. 46, as by the terms of the reference the costs were to abide the event of the award, and the defendant, under the circumstances, could not sue the plaintiffs for maliciously holding him to bail.

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At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiffs, who were builders, had agreed to let the house in question to the defendant, on a lease for seven or fourteen years, after they should have completed it according to a specified plan; and, by the terms of the agreement, any deviation from the proposed mode of finishing the house, was to be paid for by the defendant, or allowed for by the plaintiffs, according to its value. The house being finished, and the defendant having taken possession, the plaintiffs, in *August* 1826, sent him in a bill amounting to 125*l.* 9*s.* 8*d.* as their charge for the extra work. The lease not having been prepared or tendered to the defendant according to the terms of the agreement, he refused to pay, but on the 8th *March* 1827, the lease was duly executed by both parties. The plaintiffs afterwards made repeated applications to the defendant for payment of their bill, but of which he took no notice; they, therefore, on the 26th *April*, 1827, caused him to be arrested, on an affidavit of debt for 100*l.* and upwards, for work and labour and materials, and for goods sold and delivered. The defendant paid 10*l.* 9*s.* 3*d.* into Court; and upon the cause coming on for trial, on the 7th *July*, a verdict was taken for the plaintiffs, by consent, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the parties were referred; and the costs of the cause were to abide the event of the award, and the costs of the reference were to be in the discretion of the arbitrator. The defendant having proved, upon the reference, that he was entitled to claim an allowance from the plaintiffs for deviations made by them from the proposed mode of finishing the house, to the amount of 63*l.* 13*s.* 2*d.*, the arbitrator ordered the defendant to pay the plaintiffs 29*l.* 8*s.* 9*d.* over and above the sum paid into Court, amounting together to 39*l.* 18*s.*, and also the costs of the reference and of the award. The plaintiffs' costs of the

cause, as taxed by the Prothonotary, amounted to 68*l.* 6*s.* 3*d.* which, with the above sum of 29*l.* 8*s.* 9*d.*, the defendant paid into Court under an order of Mr. Justice *Burrough*, who directed all proceedings in the cause to be stayed, until an application could be made to the Court to allow the defendant his costs, to which he claimed before the learned Judge to be entitled, under the statute 43 *Geo.* 3, c. 46, s. 3.

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Mr. Serjeant *Wilde*, on a former day in this Term, accordingly obtained a rule *nisi*, and submitted, that, as the defendant had been arrested for 100*l.* and upwards, and the arbitrator had found that 29*l.* 8*s.* 9*d.* only were due to the plaintiffs, independently of the sum of 10*l.* 9*s.* 3*d.*, paid into Court by the defendant, he had been held to bail without any reasonable or probable cause; and more particularly so, as the plaintiffs had charged the defendant with the full amount of the extra work, although they must have been aware that he was entitled to deduct the sum of 63*l.* 13*s.* 2*d.*, allowed by the arbitrator for the deviations from the terms of finishing the house, as agreed on by the plaintiffs themselves.

Mr. Serjeant *Taddy* now shewed cause.—The Court, under the circumstances, will not interfere to deprive the plaintiffs of their costs. By the terms of the submission, the costs of the cause were to abide the event of the award; and as the parties consented, not only that the cause, but all matters in difference between them should be submitted to an arbitrator, different matters were put under his investigation, and he was empowered to resort to different *media* of proof than if the trial had been proceeded in at *Nisi Prius*. His award, therefore, is conclusive, and by which he has not only determined that the plaintiffs are entitled to retain their verdict, but also that the costs of the reference

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and of the award were to be paid by the defendant. In *Keene v. Deeble* (a), the defendant having been held to bail for 28*l.*, paid 2*l.* into Court, but, before the cause came on for trial, it was agreed that the cause, and all matters in difference, should be referred to an arbitrator; and it was further agreed that the costs of the cause, and of the reference, should abide the event; and the arbitrator having awarded the plaintiff 1*l.* 19*s.* in addition to the 2*l.* paid into Court, it was held that it was not a case within the statute, and that the defendant was not entitled to his costs; and Lord Chief Justice *Abbott*, there said (b): "The cause was stopped in its progress, by an agreement to refer all matters in difference, and it was made a part of the rule that the costs should abide the event of the award. I am of opinion, that money awarded on such a reference, is not money *recovered* within the meaning of the act:" and Mr. Justice *Bayley* said: "I think that the money awarded in this case cannot be considered as money recovered in the action. It was awarded upon a reference of the action, and all matters in difference. The parties might have made a special provision for the costs, but by the rule they agreed that they should abide the event of the award:" and Mr. Justice *Littledale* said: "I think that the word *recovered*, as used in this statute, bears the technical legal sense, recovered by the consideration and judgment of the Court;" and in conclusion, he said (c), "When parties, by their agreement, take a cause out of the ordinary course of investigation, I think that they take it out of the operation of the statute. It was further agreed that the costs should abide the event; that, as it appears to me, means the legal event, following in ordinary cases without the interposition of the Court." The only distinction between that case

(a) 3 Barn. & Cress. 491, S. C.
5 Dow. & Ryl. 383.

(b) 3 Barn. & Cress. 493.
(c) Id. 494.

and the present, is, that there, the cause was referred before it was called on for trial, and no verdict was taken for the plaintiff; yet in *Payne v. Acton* (a), where the defendant was arrested for 130*l.*, and a verdict was taken for the plaintiff, subject to a reference, and the arbitrator found that 20*l.* only were due to him, the Court refused to allow the defendant his costs. So, in *Bryson v. Simcox* (b), the defendant was arrested for 30*l.*, and it appearing at the trial, that the plaintiff was indebted to him in a small amount, a verdict was taken for the plaintiff for nominal damages, subject to a reference; and the arbitrator having found that 12*l.* only were due from the defendant to the plaintiff, the Court refused to allow the former his costs, although he had tendered the sum awarded previously to the commencement of the action. Besides, as in this case there was a complicated account between the parties, the Court will not interfere; and as the reference was not confined to the cause alone, but included all matters in difference, and the costs were to abide the event, that must mean the legal event of the award, and not the event of a subsequent application to the Court.

Mr. Serjeant *Wilde*, in support of his rule.—Although, by the submission, all matters in difference were referred to the arbitrator, yet they could only relate to the subject matter of the agreement under which the house was let by the plaintiffs to the defendant, and if the arbitrator had allowed any other matters than those connected with the cause to have been given in evidence, he would have exceeded his authority:—the verdict taken for the plaintiffs related to the cause only, to which alone the inquiry before the arbitrator was also meant to be confined. Although the plaintiffs were entitled to charge for extras,

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(a) 1 Brod. & Bing. 278; S. C. 3 B. Moore 605.

(b) 1 Moore & Payne, 355.

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yet they must have been perfectly aware that the defendant was entitled to an allowance, on account of certain omissions on their part, or deviations by them from the plan originally proposed. They, therefore, ought not to have arrested the defendant for the full amount of the extra charges, without deducting the allowance the defendant was entitled to, and of which they must have had full knowledge. In *Summers v. Formby* (a), where a cause was taken down to a second trial, and referred, and an award was afterwards made in favour of the plaintiff, the Court said that the reference was equivalent to a trial; and that it has been held to be so, so as to entitle the defendant to costs, under the statute 43 *Geo. 3*, where the plaintiff does not recover the sum for which the defendant was arrested.

Lord Chief Justice BEST.—I do not say that the Court will, in no instance where a defendant has been arrested for 100%, and the plaintiff recovers only 40%, allow the former his costs, on an application made to them under the statute 43 *Geo. 3*. But it must be an extremely strong case. Here, however, the transactions between the parties appear to me to have been of too complicated a nature for us now to interfere; nor can we, under the circumstances, say that the defendant could maintain an action against the plaintiffs for having *maliciously* arrested him and held him to bail; and if that action could not have been successfully sustained, there is no ground for this application; and I am clearly of opinion, that there is no colour for such an action.

Mr. Justice PARK.—I agree, that the matters in dispute between the parties were of too complicated a nature for us to say, that the defendant is entitled to his costs, for hav-

(a) 1 Barn. & Cress. 100.

ing been held to bail without any reasonable or probable cause. The case of *Thompson v. Atkinson* (a), appears to me to be precisely in point. There, the defendant was arrested for 179*l*. At the trial, a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the parties, were referred, and the costs of the cause were to abide the event of the award. The arbitrator found, that, at the commencement of the suit, there was due from the defendant to the plaintiff the sum of 45*l*. 10*s*., that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l*., and that the defendant, by reason thereof, was entitled to compensation in damages to the amount of 20*l*. The arbitrator then ordered the verdict to be finally entered for the plaintiff, for 25*l*. 18*s*., the balance due to him after deducting therefrom the damages awarded to the defendant. The Court refused to allow the defendant his costs under the statute 43 *Geo.* 3, inasmuch as, by the terms of the reference, the costs were to abide the event of the award, and that was in favour of the plaintiff.

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Mr. Justice BURROUGH, and Mr. Justice GASELEE, concurring—

Rule discharged (b).

(a) 6 Barn. & Cress. 193.

Edit. 982, 983, where all the cases

(b) See Tidd's Practice, 9th

on this subject are collected.

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Tuesday,
Nov. 18th.

In an action on a bail bond, it is not necessary to aver in the declaration that the writ under which the party was arrested was issued on an affidavit of debt, or that the sum sworn to was indorsed on the writ.

SHARPE, Assignee of the Sheriff of MIDDLESEX v. ABBEY,
LEGH, and HARVICK.

THIS was an action of debt on a bail bond, by the assignee of the Sheriff of *Middlesex*. The declaration stated that the defendant *Abbey*, on the 6th *February*, 1828, was taken and arrested by the Sheriff of *Middlesex*, at the suit of the plaintiff, by virtue of a writ of *capias ad respondendum*, directed to the Sheriff of the county of *Middlesex*, out of the Court of our Lord the King of the *Bench*, at *Westminster*, in the county of *Middlesex*, before that time in due manner issued, and returnable therein, in fifteen days of *Easter*, in the year of our Lord, 1828, at the suit of the plaintiff against the defendant *Abbey*; by which writ, the sheriff was commanded that he should take *Abbey*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our Lord the King's Justices, at *Westminster*, in fifteen days of *Easter*, 1828, to answer the plaintiff in a plea of trespass, and also that the defendant *Abbey* might answer the plaintiff, according to the custom of his Majesty's Court of *Common Bench*, in a certain plea of trespass on the case upon promises, to the damage of the plaintiff of 300*l.*—The plaintiff then averred, that the Sheriff took bail for the appearance of *Abbey*, according to the exigency and tenor of the said writ, and that thereupon, *Abbey*, as the principal, and the defendants *Legh* and *Harvick*, as his bail and sureties, afterwards, and before the return of the said writ, executed a bail-bond to the Sheriff, conditioned for the appearance of *Abbey* before the King's Justices at *Westminster*, in fifteen days of *Easter*, 1828, to answer the plaintiff in a plea of trespass, and also in a certain plea of trespass on the case upon promises, to the plaintiff's damage of 300*l.*; that *Abbey* did not appear according to the condition of the bond, whereby it became forfeited, and

was assigned by the Sheriff to the plaintiff, of which the defendant had notice. Breach, non-payment of the sum mentioned in the condition.

To this declaration, the defendants demurred specially, and assigned for causes—That there is not any cause of action shewn or stated by or for the plaintiff to have or maintain his aforesaid action thereof against the defendant, inasmuch as there are divers omissions of material statements and allegations in the declaration; that it contains no statement or allegation that any affidavit was made and filed of any cause of action of the plaintiff against the defendant *Abbey*, amounting to the sum of 20*l.* or upwards; that there is no statement or allegation that the sum or sums specified in such affidavit was or were indorsed upon the back of the writ in the declaration mentioned; that it did not contain any statement or allegation that the writ was marked or indorsed for bail for any sum of money for which the defendant *Abbey* might be lawfully held to bail, or for any sum whatever; and that there is no statement or allegation that the bail taken by the Sheriff in the declaration mentioned, was taken for the sum or sums indorsed upon the said writ; and also that the declaration did not shew that the Sheriff was in any wise authorized to arrest *Abbey*, or to require or take such a bond as in the declaration mentioned.

The plaintiff joined in demurrer.

The cause now came on for argument, when—

Mr. Serjeant *Wilde*, in support of the demurrer.—Although in *Whiskard v. Wilder* (a), in an action on a bail-bond, an objection was taken that the declaration ought to have set forth that the debt was sworn to, and the sum marked or indorsed on the writ, as required by the statute

(a) 1 Burr. 330.

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12 Geo. 1, c. 29, the Court held it to be unnecessary:—yet that case having been referred to in argument, in *Hill v. Heale* (a), Sir James Mansfield said (b): “The question there related to the form of the declaration. Mr. Justice Denison, who was a pleader of the first eminence, observed, that in practice the form of the declaration was sometimes one way, and sometimes another; and that he did not think the averment necessary. This was the sole question before the Court. But I should have great difficulty in agreeing with the doctrine imputed to the Court of *King’s Bench*, that the statute of 12 Geo. 1, is merely directory; I cannot help entertaining great doubts respecting that *dictum*. The Sheriff must see by the writ, whether it be indorsed or not, and I cannot think he could justify an arrest without it. But this was merely a *dictum*, and not necessary to the opinion of the Court.” Besides, it must be considered that a party gives a bail-bond under duress, and the statute 12 Geo. 1, positively requires that the sum for which a defendant is arrested, shall be marked or indorsed on the writ.

Mr. Serjeant *Andrews*, for the plaintiff, was stopped by the Court.

Lord Chief Justice BEST.—If we were called on to decide whether a party could be legally arrested without an affidavit of debt, we should have no hesitation in saying that he could not. But the question is, whether, in a declaration on a bail-bond, it is necessary to set forth that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ. The case of *Whiskard v. Wilder*, is expressly in point, and it was recognised and adopted as an authority in the late case of *Wilcoxon v. Night-*

(a) 2 New Rep. 199, 200.

(b) *Ib.* 201.

ingale (a). We must presume that the arrest, and all the proceedings previous to the bail-bond, were regular, and took place in due course.

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ABBET.

Mr. Justice PARK.—The case of *Whiskard v. Wilder*, was cited and approved of by Lord *Ellenborough*, in *Arundell v. White* (b).

Mr. Justice BURROUGH.—This very point was decided by this Court, in *Dorrington v. Bricknell* (c), in *Easter Term*, 1826.

Mr. Justice GASELER.—It is not necessary for us to decide whether the statute 12 *Geo.* 1, be directory or not. In *Hill v. Heale*, the only question was, whether the provision in the statute 5 *Geo.* 2, c. 30, was directory or conditional, respecting the affidavit required by the 23d section, as to the truth and amount of the petitioning creditor's debt; and the Court held it to be directory only. Here, the defendant having entered into a bail-bond, it is too late for him to take the objection. I have looked into the precedents, and find that in some the affidavit is set forth, but that in others it is not. By modern pleaders it is deemed advisable not to refer to it. If the party had been arrested and the affidavit had not been duly filed, or the sum sworn to indorsed on the back of the writ, he might have had his remedy against the Sheriff.

Judgment for the plaintiff.

(a) 1 Moore & Payne, 281.

(b) 14 East, 224.

(c) See 11 B. Moore,

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Wednesday,
Nov. 19th.

By a Judge's order, made up—on hearing the attornies on both sides, and by their consent, a cause was referred to arbitration, and the award recited that *the cause was referred* by an order of *Nisi Prius*:—it seems that such award is a nullity, and cannot be enforced by attachment:—but the rule *nisi* for setting it aside, not expressing it to have been drawn up on reading the order of reference:—*Held*, to be irregular.

CHRISTIE v. HAMLET and two others.

BY an order of Lord Chief Justice *Best*, of the 17th *June* last, and made “upon hearing the attornies on both sides, and by their consent,” this cause, and all matters in difference between the above parties, were referred to the award of two arbitrators; and it was also directed, that the order might be made a rule of this Court. The arbitrators made their award on the 10th *September* last, which commenced by reciting, that, at the Sittings of *Nisi Prius*, held at *Guildhall*, in and for the city of *London*, on the 17th *June*, 1828, before Sir *William Draper Best*, Lord Chief Justice, &c., a cause came on to be tried between the above-named plaintiff and defendants, and that, upon such trial, with the consent of the plaintiff and defendants, their counsel and attornies, an order or rule was made, that it should be referred to the arbitrators named in the order, to settle and ascertain what damages the plaintiff had sustained, and that a verdict should be entered accordingly.

Mr. Serjeant *Wilde*, on a former day in this Term, *vis.* the 11th instant, upon an affidavit, stating, that no such order of *Nisi Prius* as that set forth in the award had been at any time made in this cause, obtained a rule *nisi* that the award might be set aside. The learned Serjeant submitted that the award was bad, as it purported to have been made under a supposed order of *Nisi Prius*, which had never existed, the order, in point of fact, having been made by the Lord Chief Justice, at Chambers.

The rule *nisi* was drawn up as follows: “Upon reading the affidavit of *J. W.* and the paper writing thereto annexed (*vis.* a copy of the award), it is ordered, that the plaintiff, upon notice of this rule, to be given to him or his attornies, shall shew cause on *Thursday* next why the award made in this cause should not be set aside.”

Mr. Serjeant *Taddy* and Mr. Serjeant *E. Lawes* now shewed cause, and submitted, that there was no ground for the objection, as it was a mere mis-recital of the order of reference, by stating it to have been made at *Nisi Prius*, instead of terming it a Judge's order, and adopting the usual terms connected with such an order. But, as this is a mere technical objection, the rule *nisi* for setting aside the award is insufficient, as it should have been drawn up on reading the rule or order of reference, as that was the only authority under which the arbitrators acted; and the application to set aside the award could not have been made, unless the order had been previously made a rule of Court. Besides, the objections to the award should have been stated in the rule *nisi*, according to a late rule laid down by the Court of *King's Bench*, and which has been since adopted in the Court of *Exchequer* (a).

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Mr. Serjeant *Wilde*, in support of his rule, insisted, that, as the order of reference had been set out in terms in the affidavit to which the rule *nisi* referred, it was sufficient.

But the Court thought otherwise, and said, that they had no authority to interfere, and that an attachment could not be granted to enforce performance of the award by the defendants, it being in fact a nullity, as no such order of *Nisi Prius* existed as was set out or recited in the award. But, if the plaintiff thought fit, he had his remedy by action.

Rule discharged, without costs.

(a) See 4 Barn. & Ald. 539; 11 Price, 57; 1 M'Clel. & Younge, 394.

1828.

Thursday,
Nov. 20th,

A misnomer of the christian name of the tenant in a writ of right, can only be taken advantage of by a plea in abatement.

JONES, Demandant; WIGHTWICK, Tenant.

MR. Serjeant *Russell* moved that a writ of right, which had been issued in this cause, might be quashed, on the ground of a misnomer in the christian name of the tenant.

But the Court said, that, as there was no distinction to be drawn between proceedings in a real action and a civil suit in this respect, the tenant must be confined to the ordinary rule of raising the objection by a plea in abatement.

The learned Serjeant, therefore, took nothing by his motion.

Thursday,
Nov. 20th.

The plaintiff declared on a promissory note, and for goods sold—The Court would not change the venue on an affidavit stating that the principal and interest due on the note had been paid, and that the plaintiff had promised to give it up to the defendant—as it was incumbent on the defendant to state that the note did not exist.

RICHARDS *v.* FURNIEU.

MR. Serjeant *Russell* applied for a rule *nisi* on the part of the defendant, that the *venue* in this cause might be changed from *London* to *Stafford*. He founded his motion on an affidavit, which stated, that the declaration contained two counts on promissory notes, counts for wheat sold and delivered, and the usual money counts, that payments had been made from time to time on the note, equal in amount to the principal and all interest due thereon, and that the plaintiff had repeatedly promised to give up the notes to the defendant; but that he had not done so, and that the plaintiff's cause of action on the sale of the wheat arose in *Staffordshire* and not elsewhere. The learned Serjeant admitted that the cases of *Shepherd v. Green* (a), and *Hart v. Taylor* (b), had established the principle, that, if an action be *bond fide* brought on a promissory note, the plaintiff may retain the *venue*, although the action be for other causes also; and that the Court

(a) 5 Taunt. 576.

(b) 2 Dow. & Ryl. 164.

would not restrain the plaintiff from proceeding in the county he had elected for the other causes. But here, as the defendant had sworn that the notes were satisfied by payment of the principal and interest due thereon, it was sufficient to shew that the plaintiff could have no right of action against the defendant in respect of such notes.

But the Court were of opinion, on the authority of the cases referred to, that it was incumbent on the defendant to state, by affidavit, that the notes did not exist; and, he not having done so—

Rule refused.

MACKLIN *v.* WILLIAM WATERHOUSE, JOSEPH WATERHOUSE, CLENCH, and WEEKS.

Monday,
Nov. 24th.

THIS was an action against the defendants, the proprietors of the *Exeter* Mail coach, to recover the value of a parcel left by the plaintiff at a booking-office at *Salisbury*, to be forwarded from thence to *London*, which was lost. The *first* count of the declaration stated, that, on the 30th *November*, 1826, to wit, at *London*, the plaintiff, at the special instance and request of the defendants, caused to be delivered to them, and the defendants then and there received into their care and custody, a certain package or parcel, containing divers, to

A carrier is an insurer of the goods that he carries—he is obliged, for a reasonable reward, to carry any goods that are offered him, to the place to which he professes to carry goods, if his carriage will hold them, and he is informed of their quality and value—he is not obliged to

take a package, the owner of which will not inform him of its contents or value; but, if he do not ask for this information, or if, when he asks and is not answered, he still takes the package, he is responsible for its value, whatever that may be—he may, by notice, limit his responsibility as an insurer; but a notice will not protect him against the consequences of a loss occasioned by gross negligence.

In an action against coach-proprietors, for the loss of a parcel, the defendants proved a notice, exposed in a booking-office at *Salisbury*, kept by a person named *Weeks*, in the following terms:—"Take notice. The proprietor of *this office* will not be accountable for any parcels or packages exceeding the value of *five pounds*, unless entered as such, and paid for accordingly." One *Weeks* was a defendant on the record; but no evidence was offered to shew that he was the same *Weeks* who was the proprietor of the office:—*Held*, that this was not a sufficient notice, and that the defendants were still subject to the unlimited responsibility of common carriers.

Quære—Whether the entrusting valuable property to a servant, of whose character the carrier gave no account at the trial, was sufficient to authorize the Jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice?

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wit, three notes, commonly called promissory notes, for the payment of divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 45*l.*, and payable to bearer on demand, at a certain bank of *William Bird Brodie & John Dowding*, at *Salisbury*, or at *Messrs. Remington, Stephenson, & Co.*, Bankers, *London*, and divers, to wit, eight pieces of the current coin of this realm, called half sovereigns, of the said plaintiff, of great value, to wit, of the value of 49*l.*, to be safely and securely carried and conveyed by the defendants, by a certain conveyance called the *Exeter Mail*, from *Salisbury* aforesaid, to *London* aforesaid, and there, to wit, at *London* aforesaid, safely and securely to be delivered for the plaintiff for certain reasonable hire and reward to the defendants in that behalf; yet, that the defendants, not regarding their duty in that behalf, but contriving, and fraudulently intending, to deceive, defraud, and injure the plaintiff in this behalf, did not nor would safely or securely carry or convey, or cause to be carried or conveyed, by the the said conveyance called the *Exeter Mail*, or in any other manner, the said package or parcel and its contents aforesaid, from *Salisbury* aforesaid to *London* aforesaid, nor there, to wit, at *London* aforesaid, safely or securely deliver the same for the plaintiff; but, on the contrary thereof, the defendants so carelessly, negligently, and improperly behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, and default of the defendants in the premises, the said package or parcel and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the plaintiff, to wit, at &c. aforesaid. There was also a count in trover for the notes and half sovereigns. Plea—Not guilty.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Easter Term*, it was admitted that the defendants were the proprietors of the *Exeter Mail* coach, running from thence, through *Salisbury*, to *London*; and the plaintiff proved, that his attor-

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ney at *Salisbury* sent a female servant with a parcel containing *Salisbury* bank notes, and half sovereigns, of the value of 49*l.*, to a coach-office at *Salisbury*, kept by one *Weeks*, on the outside of which was painted in large letters, “*Weeks’s* Mail and General Coach-office;” but it did not appear, nor did the plaintiff offer any evidence to shew, that *Weeks*, the proprietor of that office, was one of the above-named defendants, or that the plaintiff or his attorney knew that the proprietor of the office there had any interest in the *Exeter* Mail.

For the defendants, the book-keeper at *Weeks’s* office at *Salisbury* was called, who stated, that the woman who brought the parcel told him it was a parcel of consequence, but that she did not know what its value was; that thereupon he, the book-keeper, told her that it ought to be insured: but that he booked it for *London* without its being insured, and that the servant paid two-pence for booking. The defendants then proved, that a notice to the following effect was stuck up on a board in a conspicuous part of the office at *Salisbury*:—

“Take notice!! *The proprietor of this office* will not be accountable for any parcel or package exceeding the value of five pounds, unless entered as such, and paid for accordingly.” The defendants also proved, that both the plaintiff and his attorney were aware of this notice, at the time the latter sent his servant with the parcel, which was proved to have been forwarded to *London* by the defendants’ coach, and admitted by Mr. *Waterhouse* to have been stolen by a youth (a servant in their employ), whose duty it was to take care of and watch parcels sent to the office in *Lad Lane*, directed to persons residing in and near *London*; but no evidence was given as to his character when the defendants first took him into their service.

It was objected, for the defendants,—*First*, that, as the plaintiff had charged them with having received the parcel on their general responsibility, and as there was in

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the office at *Salisbury*, a notice limiting their liability, of which the plaintiff and his agent were proved to have been aware, the notice in effect formed an essential part of the contract; and as the plaintiff had not charged the defendants as common carriers, but alleged that it was their duty to convey the parcel unconditionally;—on proof of the notice, there was a variance between the contract given in evidence and that laid in the declaration;—*Secondly*, that the allegation that the parcel was lost through the negligence of the defendants was not proved, as it was stolen by one of their servants; and a loss by a felony is no evidence of a loss by negligence; and that they were, at all events, protected by the notice from any loss that did not happen through *gross* or palpable negligence on their parts.

His Lordship told the Jury that he thought it was incumbent on the defendants, in order to rebut the presumption of negligence, to shew that they had a good character with the boy who stole the parcel, at the time they received him into their service, which they had failed to do: and he left it to the Jury to say, whether the female servant, who took the parcel to the office at *Salisbury*, had been guilty of negligence, or had failed in her duty towards the defendants, in not communicating to her master what the book-keeper had said to her respecting the insurance; or, whether the defendants could, under the circumstances, be said to have been guilty of gross negligence. They found that there had been no negligence or concealment on the part of the plaintiff, and that the defendants had been guilty of negligence, and gave a verdict for the plaintiff, damages 49*l.*, the alleged value of the parcel.

Mr. Serjeant *Wilde*, in the course of the last Term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, or a new trial granted, or that the judgment might be arrested, on the grounds, that there was no evidence of negligence on the part of the defendants, as the mere fact of a felony by their servant could not war-

rant the Jury to impute negligence to the master; and that the declaration was insufficient, as it did not set out the notice by which the defendants restricted their liability, and which consequently formed part of the contract; and he relied on the case of *Latham v. Rutley* (a), where the declaration stated that the defendants undertook to carry goods from *London*, and deliver them safely at *Dover*, and the contract proved being to carry and deliver safely (fire and robbery excepted), it was held to be a fatal variance; and Lord *Tenterden* said, that, "if a stipulation be made, that, under certain circumstances, a carrier shall not be liable at all, it must be stated in the declaration."

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Mr. Serjeant *Taddy* afterwards shewed cause. (It was admitted by Mr. Serjeant *Wilde*, that the declaration was sufficient, and the motion, as far as it related to arresting the judgment, was abandoned).—Even admitting that the notice applied to *Weeks*, the proprietor of the office at *Salisbury*, there was no evidence adduced at the trial to connect the defendants with him, neither was it shewn that the plaintiff's attorney, or the servant who delivered the parcel, knew that *Weeks* had any interest in the Mail by which the parcel was to be conveyed. The plaintiff sued the defendants in *tort* for their negligence as common carriers, and not for any supposed non-performance of a contract. In *Clarke v. Gray* (b) it was held, that *assumpsit* might be maintained, in the common form of declaring, against a carrier for the loss of goods which were beyond the value of 5*l.*, and were not in fact paid for accordingly, although it was part of the contract, proved by a general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the carrier *would not be accountable for more than 5*l.* for goods, unless entered as such, and paid for accordingly—*

(a) 2 Barn. & Cress. 20.

(b) 6 East, 564.

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on the ground, that it formed no part of the consideration for the act, or of the entire act or duty which was to be done in virtue of such consideration; and Lord *Ellenborough* there drew the distinction, and said (a): "If, indeed, the provision be of such a nature as goes in discharge of the liability of the party under the contract altogether, in case a particular condition is not complied with; as in *Clay v. Willan* (b), where the goods were not to be accounted for *at all*, unless properly entered and paid for; that will not merely operate in reduction of the damages, but in bar of the action:" but, even then, it does not follow that it is necessary to set out the notice in the declaration. In *Smith v. Horne*, Mr. Justice *Burrough* said (c): "Carriers are, by the custom of the realm, bound to convey parcels with safety and security. The notices now usually given by them were never known till the case of *Forward v. Pittard* (d), and these notices form no part of the declaration. The declaration is, therefore, good in its old form, and is a sufficient answer to such notice, if it express that the carrier has been guilty of negligence." In *Latham v. Rutley* (e), the plaintiff declared in *assumpsit*, and the contract for the carriage of the parcel was subject to the exceptions of fire and robbery; and the Jury found that the loss was not a loss by robbery within the meaning of the exception. There, as the carrier was not to be responsible at all, in the events of fire and robbery, the exception ought to have been stated in the declaration. Here, however, the notice forms no part of the contract, but only arises in defence of the carrier. Besides, the notice only applied to *Weeks*, as proprietor of the office at *Salisbury*, and there was no evidence to connect him with the defendants, as the proprietors of the coach by which the parcel was to be sent; and a notice by

(a) 6 East, 570.

Taunt. 144.

(b) 1 Hen. Bl. 298.

(d) 1 Term Rep. 27.

(c) 2 B. Moore, 22; S. C. 8

(e) 2 Barn. & Cress. 20.

the one cannot be extended to or considered as a notice by the others, as they stood in different and distinct characters. In *Garnett v. Willan* (a), the carriers gave notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless the value were specified, and an insurance paid. There, however, the notice was by *the proprietors of the public carriages who transacted their business at the office* where the parcel was booked. But here, *Weeks*, as the proprietor of the office at *Salisbury*, gave notice that *he* would not be answerable, *as such*; by which it must be inferred that he would not be individually responsible for parcels committed to his care, as the keeper of such office: particularly, as several other coaches, of some of which the defendants were not the proprietors, took up parcels and passengers that were left or booked there. *Weeks*, therefore, only received parcels as the agent for the proprietors of those coaches, and the one character was wholly distinct from the other. Notices of this description must be construed strictly, and in a case of doubt, the Court will limit rather than extend the exemption sought to be acquired by them. The case of *Beck v. Evans* (b) is a strong authority to shew, that a carrier, notwithstanding such a notice, is responsible for the negligence of his servants. Mr. Justice *Le Blanc* there said (c): “ I think the exemption of carriers from general liability, by reason of notices of this sort, has been carried to the utmost extent, and cannot be supported on any other ground than this, that they shall not be held liable to a large amount, where they only get a small reward for the carriage.” In *Kirkman v. Shawcross*, Lord *Kenyon*, in speaking of carriers, said (d): “ They have no right to say they will not receive any goods but on their own terms;”

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(a) 5 Barn. & Ald. 53.

(b) 16 East, 244.

(c) Id. 247.

(d) 6 Term Rep. 17.

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and in *Rogers v. Head* (a), it was held, that, if one deliver goods to a carrier to be delivered at a particular place, in consideration of which the plaintiff undertakes to give him a reasonable reward for the carriage, and the carrier promises to deliver them safely, the consideration is sufficient, although no certain sum be mentioned; because a carrier may demand as much as is reasonable, and the other party is bound to pay it. But even if the notice in this case should be deemed to extend to all the defendants, there was sufficient evidence to shew that they had been guilty of such a degree of negligence as would render them liable, independently of such notice. In *Garnett v. Willan*; Mr. Justice *Holroyd* said (b): “ Upon principle, as well as upon the authority of decided cases, a carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own *personal misconduct or that of his servants*;” and Mr. Justice *Bayley* said (c): “ It has been said, that the object of the notice was, to exempt the carrier from all responsibility for the acts of his servants. That, however, is not the object expressed in the notice; and, it has been held, in many cases, that a carrier is responsible for the want of care and diligence of his servants:” and he referred to *Smith v. Horne* (d), *Bodenham v. Bennett* (e), and *Birkett v. Willan* (f), in support of that proposition. The question then is, whether an act of felony by the servant can have the effect of rendering his masters responsible for his misconduct. The defendants were clearly guilty of negligence in not having made inquiries as to his character when they took him into their service. In *Forward v. Pittard*, Mr. (now Mr. Justice) *Burrough*, in his argument for the defendants (g), referred

(a) Cro. Jac. 262.

(b) 5 Barn. & Ald. 60.

(c) Id. 57.

(d) 2 B. Moore, 18.

(e) 4 Price, 31.

(f) 2 Barn. & Ald. 356.

(g) 1 Term Rep. 29.

to *Vidian's* Entries (a), where the custom relative to carriers is thus stated, *viz.* “*absque subtractione, amissione, seu spoliatione portare tenentur, ita quod pro defectu dictorum communium portatorum seu servientium suorum, hujusmodi bona et catalla eis sic ut prefertur deliberata, non sunt perdita, amissa, seu spoliata, et pro defectu bonæ custodiæ ipsius defendentis et servientium suorum perdita et amissa fuerunt.*” In that case, a carrier, who undertook to carry goods for hire, was held bound to deliver them, at all events, except damaged or destroyed by the act of God, or of the King's enemies. And in *Brooke v. Pickwick*, Mr. Justice *Gaselee* said (b): “Though no positive act of gross negligence had been proved, enough had been proved to lead the Jury to infer that the loss could not have happened without gross negligence on the part of the defendants' servants;” and here, the defendants have been guilty of such negligence, although the loss happened through the felonious act of one of their servants.

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Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie* in support of the rule.—The notice clearly formed part of the contract between the parties, as it was placed in a general coach-office where parcels and passengers were booked for coaches running to and from various parts of the country, and of which there were several and distinct proprietors. The office-keeper, therefore, acted as the agent for the proprietors of all these coaches, in the reception and conveyance of parcels booked at his office. Besides, he was a part proprietor of the Mail by which the plaintiff's parcel was conveyed; and he, therefore, stands in the situation of one of several partners giving notice as to the terms on which the firm contract; but, even if that were not so, the defendants adopted his contract, by receiving the parcel into their coach. If it had been stolen from the office, had it not

(a) Page 27.

(b) 4 Bing. 224.

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been for the notice, the defendants would have been equally liable as if it had been stolen from the coach. In *Newborn v. Just* (a), it was held, that a keeper of a booking-office could not set up a notice that he would not be answerable for goods above the value of 5*l.*, unless specially paid for, as a defence against the effect of negligence in himself or his servants; and Lord Chief Justice *Best* said, that the notice would not assist the defendant, as he was not in the situation of a carrier; that the office-keeper was not an insurer, and that the notice was to protect from insurance. So, here, the parcel was taken to the office at *Salisbury*, for the purpose of being conveyed to *London*, and the party taking it was informed of the terms on which it was to be carried, and that it ought to be insured. The insurance could only apply to the conveyance, and the responsibility of the different proprietors of the coaches attaches the instant the parcels are received and booked by the office-keeper, who is their accredited agent in that behalf. As, therefore, the effect of the notice is, to limit the responsibility of the coach proprietors, and is in the nature of a qualified contract, it was incumbent on the plaintiff to set it out in the declaration, and more especially so, as it was an essential part of the contract, and enabled the defendants to make an extra charge: for, as was said by Mr. Justice *Lawrence*, in *Harris v. Packwood* (b), “there is nothing unreasonable in a carrier requiring a greater sum, when he carries goods of greater value, for he is to be paid not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods.” In *Yate v. Willan* (c), although the plaintiff declared in *assumpsit* as upon a general undertaking by the defendant to carry goods for hire, yet the defendant paid money into Court;—it was, therefore, an admission of the contract as laid in the declaration, and

(a) 2 Carr. & Payne, 76. (b) 3 Taunt. 272. (c) 2 East, 128.

consequently he could not give in evidence that the contract was, that he would not be answerable for goods lost, to a greater value than 5*l.*, although, if no money had been paid into Court, the plaintiff must have been nonsuited on such evidence. In *Clarke v. Gray*, the notice did not form an essential part of the contract, as here; but merely went in reduction of damages: and in *Latham v. Rutley*, Lord Chief Justice *Abbott* said (a): "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but, if a stipulation be made, that, under certain circumstances he shall not be liable at all, that must be stated." That is the true distinction; and here the defendants stipulated that they would not be accountable at all for any parcel exceeding the value of 5*l.* unless entered as such, and paid for accordingly. The contract, therefore, is not stated correctly in the declaration, as the plaintiff has professed to do; for it is there set out as a general and unqualified responsibility, whereas, the notice, which formed a most material part of it, was restrictive of the liability of the defendants; and where a contract is declared on, it must be stated correctly, whether the action be *assumpsit* or *tort*.

But the Jury have found that the defendants have been guilty of negligence, and there was no evidence to warrant such a finding. The defendants were clearly protected by their notice from every species of negligence but *gross* negligence, and that too, with reference to their duty as carriers. The *onus* of the proof of negligence lies on those who make the charge, and if there had been neglect or want of caution by the defendants, in not making the proper inquiry as to the character of their servant, when they took him into their employ, it was incumbent on the plaintiff to shew it; but he gave no evidence of that fact. But an act of felony

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(a) 2 Barn. & Cress. 22.

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committed by the servant cannot render the master responsible for a negligence on his part, for not having made the necessary inquiries as to his character. Although a master may, in some instances, be liable for the misfeasance of his servant, yet he is not so, if the servant act fraudulently, without the knowledge of the master, or wilfully and out of the course of his employment, as in *M'Manus v. Crickett* (a). So, in *Croft v. Alison*, the Court said (b): "The distinction is this, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But, if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment:" and in *Finucane v. Small* (c), a bailee of goods to be kept for hire, was held not to be answerable for a theft committed by his servants; Lord *Kenyon*, saying, that that was not a species of negligence of a description sufficient to support a declaration for negligently keeping the goods, inasmuch as he had taken as much care of them as of his own. The case of *Nicholson v. Willan* (d), is decisive to shew that a carrier is not answerable for a mere negligent discharge of his duty, in his character as such; that, to render him liable, there must be an entire renunciation of that character, and of the duties attached to it, so as to make him guilty of a distinct tortious misfeasance in respect to the goods entrusted to him to be conveyed; and in *Lowe v. Booth* (e), the Court of *Exchequer* determined, that, to render a carrier liable for the loss of a valuable parcel, where he relies on the usual notice, it is necessary to establish a case of *gross* negligence

(a) 1 East 106.

(b) 4 Barn. & Ald. 592.

(c) 1 Esp. Rep. 315.

(d) 5 East 507.

(e) 13 Price 329.

against him. So, in *Bodenham v. Bennett (a)*, that Court refused to disturb a verdict found for the plaintiff, for the full value of a parcel lost, on the ground that the Jury had found that there had been gross negligence on the part of the defendant's servants. In *Smith v. Horne* the Jury were fully warranted in imputing gross negligence to the defendants, and consequently they were not protected by their notice. On these grounds, this verdict cannot be supported.

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WATERHOUSE.

Cur. adv. vult.

For the judgment, *vide post*, page 347.

(a) 4 Price, 31.

RILEY and Another v. HORNE and Others.

Monday,
Nov. 24th.

THIS was an action on the case, against the defendants, coach proprietors, to recover the value of a parcel delivered to them at *Kettering*, for the purpose of being conveyed from thence to *London*, but which was lost. The first count of the declaration stated—That the defendants were common carriers of goods for hire, from *Kettering*, in the county of *Northampton*, to *London*; that the plaintiffs caused to be delivered to them at *Kettering*, and that the defendants accepted from the plaintiffs there, a certain parcel, containing one hundred and seven yards of silk hat shags of the plaintiffs, of the value of 50*l.*, to be safely and securely carried and conveyed by the defendants from *Kettering* to *London*, and there, to wit, at *London*, safely

In an action against coach-proprietors, for the loss of a parcel directed to the plaintiffs in *London*, by their agent at *Kettering*, the defendants put in a notice, in the following form:—

“George and Blue Boar, Holborn, London. Take notice. The proprietors of carriages which set out from this office, will not hold themselves answerable for any

passenger's luggage, truss, parcel, or any package whatever, above the value of five pounds, if lost or damaged, unless the same be entered as such, and paid for accordingly, when delivered here or to their agents in town or country.” They also proved, that the plaintiffs were in the constant habit of sending parcels from *London* to the country and back by their coach. The Lord Chief Justice being of opinion at *Nisi Prius*, that the notice applied only to the journey from, and not to that to *London*, the Jury found a verdict for the plaintiffs. On motion to set aside this verdict—The Court held, that the notice applied both to the out and home journeys: but, as it had not been left to the Jury to say whether or not the plaintiffs were aware that the coach by which the parcel was sent, was one that started from the *George and Blue Boar*, they directed a new trial, in order that that question might be submitted to another Jury.

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to be delivered to or for the plaintiffs, for certain reward payable to the defendants in that behalf: yet, that the defendants, not regarding their duty as such common carriers, did not nor would safely and securely carry or convey the said parcel and its contents, from *Kettering* to *London*, and there, to wit, at *London*, safely or securely deliver the same to or for the plaintiffs, but wholly neglected so to do, and, on the contrary thereof, the defendants, so being such common carriers as aforesaid, so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, &c., of the defendants, the parcel and its contents, being of the value aforesaid, became and were wholly lost to the plaintiffs.

The *second* count stated, that the parcel was delivered to the defendants, to be taken care of, and safely and securely carried by them from *Kettering* to *London*, and there to be safely and securely delivered to the plaintiffs within a reasonable time, for a certain reward to the defendants in that behalf; that, although the defendants accepted and received the parcel and its contents from the plaintiffs, for the purpose aforesaid, and undertook to carry, convey, and deliver the same, within a reasonable time; and that, although a reasonable time for that purpose had long since elapsed;—yet that the defendants, not regarding their duty in that behalf, did not, within such reasonable time, or at any time afterwards, take care of, or safely or securely carry and convey the said parcel and its contents from *Kettering* to *London*, and there safely deliver the same for the plaintiffs, but wholly neglected so to do; and that, by means of the negligence and improper conduct of the defendants, the parcel and its contents were wholly lost to the plaintiffs. Plea—Not guilty.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Hilary* Term, it appeared that the plaintiffs were silk-weavers, residing in *London*, and that they had a manufactory at *Kettering*; that the defendants were the proprietors of a coach which

ran from the *George and Blue Boar, Holborn*, to *Kettering*, and back. That the parcel, for the loss of which the action was brought, was delivered at the defendants' office at *Kettering*, by the plaintiffs' agent or servant, who stated that it was to be conveyed to *London*, and he paid twopence for booking it, but it did not appear that the agent had ever seen, or that he knew that there was any notice in the coach-office at *Kettering*. The plaintiffs proved that the parcel was never delivered to them in *London*.—The defendants put in a notice, which was painted on a board, and placed in a conspicuous part of the office in *London*, of which the following is a copy:

“*George and Blue Boar, Holborn, London.* Take notice. The proprietors of carriages which *set out from this office*, will not hold themselves accountable for any passenger's luggage, truss, parcel, or any package whatever, above the value of *five pounds*, if lost or damaged, unless the same be entered as such, and paid for accordingly, *when delivered here, or to their agents in town or country*; nor will they be accountable for any glass, china, plate, watches, writings, cash, bank-notes, or jewels of any description, however small in value.”

The defendants then proved, that the plaintiffs were aware of this notice, and that they had frequently sent goods to and from *Kettering* by the defendants' coach; and it was contended that they were not liable, as the notice formed part of the contract under which the parcel was received at *Kettering*, and that it ought to have been entered and paid for accordingly.

His Lordship was of opinion that the notice at the office in *London* applied only to the journey from thence to *Kettering*, and not to the journey back. The Jury accordingly found a verdict for the plaintiffs, leave being reserved to the defendants to move to set it aside, and that a new trial might be granted, in case the Court should be of opinion that the construction put by his Lordship on the terms of the notice was not the true one.

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Mr. Serjeant *Andrews*, in the last *Easter* Term, obtained a rule *nisi* accordingly, and submitted, that, by the terms of the notice, the defendants were protected as well on a journey from *Kettering* to *London* as from *London* to *Kettering*; and it must be assumed, that, as the plaintiffs carried on business in both places, they must have known that the coach which came from *Kettering* was that which set out from the *George* and *Blue Boar*; and, as they were aware of the notice in the coach-office in *London*, it formed part of the contract under which the parcel was to be conveyed, and the plaintiffs should have insured it accordingly. In *Mayhew v. Eames* (a), the defendants were the proprietors of a coach running from *Lynn* to the *White Horse, Fetter Lane, London*, and a printed notice was placed in the coach-office in *London*, in precisely the same terms as the present; and it appeared that the plaintiffs, silk-warehousemen residing in *London*, had employed an agent to collect their debts in the country, and that he, as such agent, having collected provincial bank-notes to the amount of 87*l.*, inclosed them in a parcel addressed to the plaintiffs in *London*, and that he delivered the parcel at a house in *Downham*, where the coach stopped to change horses, and paid for the carriage, but the parcel was lost; and it was proved that the plaintiffs had frequently received parcels coming by coaches to the *White Horse, Fetter Lane*, and that they were aware of the notice there; but there was no evidence to shew that their agent had any knowledge of such notice at the time he delivered the parcel at the house in *Downham*; and Lord Chief Justice *Abbott* was of opinion, at *Nisi Prius*, that, as the plaintiffs knew of the defendants' notice in *London*, they ought to have desired their agent not to send parcels containing bank-notes by any coach of the defendants, and the plaintiffs were non-

(a) 3 Barn. & Cress. 601; S. C. 5 Dow. & Ryl. 484;
1 Carr. & Payne, 550.

suited accordingly; and the Court in *Banc* confirmed the ruling of the Lord Chief Justice, and refused to set aside the nonsuit. That case is precisely in point, and must govern the present.

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Mr. Serjeant *Wilde*, in the course of the last Term, shewed cause.—If this notice can avail the defendants, it would equally apply to coaches of which the defendants are not proprietors, travelling from any part of the kingdom to the *George* and *Blue Boar*. Although the plaintiffs were aware of the notice there, yet it was proved that their agent did not see any such notice in the office at *Kettering*, and it did not appear that he had ever been in *London*. The Court will pause before they adopt the decision in *Mayhew v. Eames* to the extent there laid down. But that case is distinguishable from the present, as there, the plaintiffs knew that the coach which brought their parcels from the country, and which they were frequently in the habit of receiving, set out from the *White Horse, Fetter Lane*, and they were also aware of the notice placed in the office there; but here, there was no evidence that the plaintiff's servant at *Kettering* knew that the coach in which the parcel was to be forwarded, started from the *George* and *Blue Boar*, or that the plaintiffs themselves were aware of that fact. The main ground on which the Court of *King's Bench* decided in *Mayhew v. Eames*, was, that the knowledge of the principal was the knowledge of the agent; and, as they knew the coach by which their parcels were sent ran from the *White Horse*, they should have told him not to send parcels by any of the coaches coming there; but if the construction of this notice be extended as is now contended for, it will preclude the public from all protection. Persons in the country cannot know what coaches run to a particular house in *London*, and they do not always run to the same, but may vary during the course of every journey; and even admitting

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that the plaintiffs knew the practice of the coach-office at the *George and Blue Boar*, it was incumbent on the defendants to shew that they also knew that the coach from *Kettering* to *London* set out from that office; and as no notice was given to the servant at *Kettering*, the plaintiffs have a right to look to the defendants' common law responsibility as carriers.

Mr. Serjeant *Andrews*, in support of his rule. Although, at common law, carriers are responsible for the value of goods they undertake to carry, yet that rule has long since been relaxed, and it is now fully established that they may limit their responsibility by making a special contract, which is done by giving notices similar in terms to the present, varying according to the practice of the offices from which different coaches, belonging to different proprietors, set out. But, here, the notice must be construed according to common sense, and in connection with the facts proved at the trial; and, as the plaintiffs had an establishment at *Kettering*, as well as in *London*, and were in the constant habit of sending parcels from one place to the other, and were aware of the notice in the office of *London*, it was their duty to inform their agent in the country of that fact; and the Court will now assume that he had such notice. Although, in *Mayhew v. Eames*, the plaintiffs' agent was guilty of a fraud by writing the word "mourning" on a parcel containing bank-notes; yet the Court decided on a principle which must govern the present. The notice in question applies to the proprietors of all the coaches which set out from the *George and Blue Boar*, whether parcels be delivered there or to their agents in the country; and, as the defendants were proprietors of a coach running from that office, and as the plaintiffs allowed their agent to send parcels by such coach, the knowledge of the notice having been brought home to them is sufficient to protect the de-

endants from the loss of the parcel, although it was sent by an agent in the country.

Cur. adv. vult.

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Lord Chief Justice BEST, now delivered the judgment of the Court as follows:—

In a state of society such as that we live in, in which we are supplied with the necessaries and conveniences of life by an interchange of the produce of the soil and industry of every part of the world, so much property must be entrusted to carriers, that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible, and that they should be such as to provide for the safe conveyance of property, and, at the same time, protect the carrier against risks, the extent of which he cannot know, and therefore cannot determine what precautions are proper for his security.

Fearful of laying down any rule which might be injurious, either to the public, or to those most useful servants of the public, common carriers, we thought it right to avail ourselves of the leisure afforded us by the long vacation, to consider of the cases of *Macklin v. Waterhouse*, and *Riley v. Horne*.

When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carriers' servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give proper security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, *viz.* that of taking all reasonable care of it, the

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responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, *viz.* the act of God, and of the King's enemies. As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them; he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labour and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey is more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required, than when he carries articles not easily removed, and which offer less temptation to dishonesty. He must take what is offered to him, to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass; parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers (whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole), always have the amount of what they are to answer for specified in the policy of insurance. If the extent of risk is ascertained in cases in which persons are not obliged to insure, and, if they do insure, they may fix their own rate of premium, there is greater reason for ascertaining it, where one is compelled to become an

insurer, and can only charge what the magistrates in Sessions, if they think proper to settle the rates of carriage, will allow under the statute of *William and Mary* (a), and, where no such rates are made, what a Jury shall think reasonable. It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel, in which the value of the parcel should be specified, as well as the price to be paid for the carriage; but it would add very little to the labour of the book-keeper, if he entered the value of each package, and gave the person who brought it a written *memorandum* of such entry, like the slips now made on an agreement for a policy of insurance. The giving of such *memoranda* would entirely put an end to the litigation which the notices of carriers now give occasion to, and would make the practice of carriers, as nearly as circumstances will permit, conformable to that of all other insurers. Perhaps such *memoranda* might bring the parties within the reach of the stamp-laws; and the apprehension of this may have prevented carriers from adopting a practice so effectual for their security, and driven them to the expedient of giving notices, that they will not be answerable beyond a certain sum, unless the parcels are entered and paid for as parcels of value. In *Batson v. Donovan* (b), the Court of King's Bench considered a notice of this sort, the knowledge of which was brought home to the party sending goods, as equivalent to a request on the part of the carrier to know the value; and that it made it the duty of the owner of the goods to apprise the carrier that the parcel was of value. The Legislature would probably think, if its attention were called to the subject, that a stamp-duty on contracts relative to inland carriage would be a very heavy and very inconvenient tax, and would remove the objection to written evidence of such contracts. A carrier has a right to

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(a) 3 & 4 W. & M. c. 12, s. 24.

(b) 4 Barn. & Ald. 21.

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know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are, and what they are worth, the carrier may refuse to take charge of them: but, if he do take charge of them, he waives his right to know the contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as, in the event of a loss, he cannot recover more than the amount of what he has told the carrier they were worth; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier. It was decided in *Gibbon v. Paynton* (a), that any artifice made use of to induce a carrier to think that a parcel of jewelry contained only things of small value, would prevent the owner from recovering for the loss of his parcel. In *Kenrig v. Eggleston* (b), it was held, that the owner was not required to state all the contents of his parcel, but that it was for the carrier to make a special acceptance. In *Tyly and another v. Morrice* (c), in which the preceding case is recognized and confirmed, it is said, that the true principle is, that the carrier is only liable for what he is fairly told of. In *Titchburne v. White* (d), it was determined, that a carrier is answerable for money, although he was not told that the box delivered to him contained any money, unless he was told that the box did not contain money, or he accepted it *on the condition that it did not contain money*. It may be collected from these authorities, that it is the duty of the carrier to inquire of the owner as to the value of his goods, and that, if he neglect to make such inquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is answerable for the full value of the goods, however great it may be. This is a convenient rule. It imposes no dif-

(a) 4 Burr. 2298.

(b) Aleyn, 93.

(c) Carth. 485.

(d) 1 Stra. 145.

ficulty on the carrier. He knows his own business and the laws relative to it. Many persons who have occasion to send their goods by carriers, are entirely ignorant of what they ought to do to insure their goods. Justice and policy require that the carrier should be obliged to tell them what they should do. Although a carrier may prove that the owner of goods knew that the carrier had limited his responsibility by a sufficient notice; yet, if a loss be occasioned by *gross* negligence, the notice will not protect him. Every man, who undertakes, for a reward, to do any service, obliges himself to use due diligence in the performance of such service. Independently of his responsibility as an insurer, a carrier is liable for *gross* negligence. This point is settled by *Sleat v. Fagg* (a), *Wright v. Snell* (b), *Birkett v. Willan* (c), *Beck v. Evans* (d), and *Bodenham v. Bennett* (e). The Jury are to decide what is *gross* negligence. We may, however, observe, that the most anxiously attentive person may slip into inadvertence or want of caution. Such a slip would be negligence, but not such a degree of negligence as would deprive a carrier of the protection of his notice. The notice will protect him, unless the Jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of. If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it inform the owner of the goods, that the carrier, by whom he proposes to send them, will not undertake for their safe conveyance, unless paid a premium proportioned to their value. We have established these points—that a carrier is an insurer of the goods that he carries—that he is obliged, for a reasonable reward, to carry any goods that are offered him,

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(a) 5 Barn. & Ald. 342.

(b) Id. 350.

(c) 2 Barn. & Ald. 356.

(d) 3 Camp. 267; S. C. 16 East, 244.

(e) 4 Price, 31.

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to the place to which he professes to carry goods, if his carriage will hold them, and he is informed of their quality and value—that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are—that, if he do not ask for this information, or if, when he asks and is not answered, he still takes the goods, he is answerable for their amount, whatever that may be—that he may limit his responsibility as an insurer, by notice; but that a notice will not protect him against the consequences of a loss by *gross negligence*.

Let us see how these principles bear on the two cases now under our consideration.

In *Macklin v. Waterhouse*, the notice was in these words:—"Take notice. The proprietor of *this office* will not be accountable for any parcel or package exceeding the value of *five pounds*, unless entered as such and paid for accordingly." A Mr. *Weeks* was the keeper of this office, at which parcels were received and booked for several coaches, belonging to different proprietors. No evidence was given, that *Weeks*, the proprietor of the office, was the same *Weeks* who was one of the defendants, or that the plaintiff or his agent knew that the office-keeper had any interest in this coach. No one can collect from the notice, that the proprietor of the office has any thing to do with any of the coaches that take parcels from that office. If he had by his notice told those who had occasion to go to his office, that none of the proprietors of coaches that took parcels from it, would be responsible, such a notice would have been sufficient. The persons who carry parcels to coach-offices, are generally servants and other persons who cannot have much knowledge of matters of this sort. The notice should be plain, and easily understood by such persons. They are not to be required to determine, whether a notice given by the keeper of a coach-office must apply to the risks undertaken

by all the coach proprietors whose coaches are loaded from that office. This is a case without sufficient notice, and the defendants are subject to the unlimited responsibility of common carriers. It is not necessary to decide in this case, whether, if it had been shewn that *Weeks* was a proprietor of the coach, a notice given by him as proprietor of the office, could form a special condition in his contract as a coach proprietor. This is an answer to the point made at the trial, that the notice in this case should have been stated in the declaration; for, as there was no *sufficient* notice, it is the same as if there was *no* notice. But it was said, that the declaration stated, that the loss was through the negligence of the defendant, and that there was no proof of any negligence. Certainly not sufficient proof of *gross* negligence; but, as there was no notice, the allegation of loss by negligence was not a material allegation, and no proof of it was necessary.

If, however, any proof of such allegation was necessary, a loss, the cause of which is not shewn, is sufficient evidence of simple negligence, although not of *gross* negligence. The book-keeper deposed to a conversation with the female servant who brought the parcel, which she did not contradict, but merely said that she did not recollect it. It was not considered at the trial, that what passed at this conversation limited the responsibility of the defendants. I did not, therefore, put it to the Jury to say, whether or not they believed that a conversation to the effect deposed to had passed. The book-keeper swore that the woman who brought the parcel said, "that it was a parcel of consequence; that he asked her if it was a parcel of value; and that she said that it was, but that she did not know what its value was; and that the book-keeper told her it ought to be insured." These were the words used by the witness. To talk of insurance to a country servant was not the way to inform her what it was proper for her to do. This agent of the defendants should have told the servant, when she said she did not know the

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value of the parcel, to go back to her master and ask him what the value of his parcel was, that the agent might know what to charge him for the carriage of it; and that, until he knew the risk that his employers were to be answerable for, he would not take charge of the parcel. Instead of this, he took it; and it was lost: and it was the only parcel that was lost. That I might conform to the opinion of the majority of the Court of *King's Bench* in *Batson v. Donovan*, I asked the Jury whether the servant or agent of the plaintiff had been guilty of any negligence, or failed in her duty to the carriers. They answered in the negative, and I think their answer was the proper one. As the carrier took the parcel, without requiring to know its value, and without insisting that it should be entered and paid for according to its value, he took it without any limitation of his common-law responsibility, and must be answerable for its loss.

It is unnecessary for us to decide whether the entrusting valuable property to a servant, of whom the carrier chose to give no account at the trial, was sufficient to authorize the Jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice.

In *Riley v. Horne*, I was of opinion, at the trial, that the notice did not apply to the journey to *London*. The Court of *King's Bench* has determined, that such a notice applies to the journey back as well as to the journey out. A carriage that returns to a place, must have gone from it; and, therefore, a notice from the proprietors of coaches going from it, may be applied to their return journey. But, to give effect to such a notice, it must be proved, that the person who sent goods on that same journey, knew that the coach came from the *George and Blue Boar, London*. In this case the plaintiffs had establishments in the country and in *London*, and were constantly in the habit of sending parcels from *London* to the country, and from the country to *London*, by this coach.

It is most probable, therefore, that the Jury would have found that the plaintiffs knew that the carriage set out from the *George and Blue Boar*; and that this notice applied to its journey out and home. As I thought that the notice was not so plain and direct as it ought to have been, and, therefore, did not leave it to the Jury to say, whether or not the plaintiffs knew that the coach was one that started from the *George and Blue Boar*, there ought to be a new trial in this case, that the question may be put to the Jury.

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In *Macklin v. Waterhouse*, the rule must be—

Discharged.

In *Riley v. Horne*, the rule for a new trial must be made—

Absolute (a).

(a) *Covington v. Willan*, Gow's N. P. C. 115; *Stephenson v. Hart*, 1 Moore & Payne, 357; *Bradley v. Waterhouse*, 3 Carr. & Payne, 318; S. C. 1 Mood. & Malk. 154.

RIDDELL v. SUTTON, Executrix of SUTTON.

Monday,
Nov. 24th.

THIS was an action of debt, on an award. The *first* count of the declaration stated, that, by articles of agreement made the 31st *December*, 1822, between the plaintiff of the one part, and the defendant, as the executrix of *William James Sutton*, deceased, of the other part, after reciting therein, that divers disputes and differences had arisen, and were then depending between the plaintiff and the defendant as executrix as aforesaid, respecting certain unsettled accounts between them, which they had mutually

Debt is maintainable against an executor on an award made in pursuance of a submission by him after the death of his testator, and a plea of *plene administravit* is no bar to the action; as the executor, by submitting to a reference, without protesting

against the reference being taken as an admission of assets, admits that he has assets.

By an agreement, after reciting that divers disputes and differences had arisen and were depending between the plaintiff and defendant, as executrix, respecting certain unsettled accounts between them, and that, for finally settling such differences, it was agreed that the matters in dispute should be referred to the final award of two arbitrators. Plea, by the executrix, that no evidence was offered of assets, before the arbitrators, nor did she admit that she had any:—*Held*, ill, on general demurrer, as it imputed misconduct to the arbitrators, which is not the subject of a plea, but only a ground to apply to the Court to set aside the award.

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agreed to refer to the award and determination of the persons thereafter named: therefore, for the finally settling such disputes and differences, it was (amongst other things) agreed by and between the parties thereto, mutually and reciprocally, that the said matters in dispute between them should be, and they were thereby referred to the final award and determination of *T. R.* and *T. B.*, so as they should make their award in writing, on or before the 20th *January*, then next; and if they should not do so, the matters in difference were to be referred to the award and determination of such person as umpire, as should be named in manner thereafter mentioned, and the costs of the reference and of the award were to be in the discretion of the said arbitrators or umpire. The plaintiff then averred, that the said *T. R.* and *T. B.*, having taken upon themselves the said arbitration, and *having heard* and duly weighed *the allegations and proofs* of both the said parties concerning the matters in difference so referred to them as aforesaid, and having examined the various books, accounts, papers, and writings relating to the said matters in dispute, and also the parties themselves, did, in due manner, and within the time limited for making the said award, to wit, on the 18th *January*, 1823, make their award and determination of and concerning the said matters in dispute so referred to them as aforesaid, *in writing*, under their hands; and that, by the said award, the said *T. R.* and *T. B.* found that there remained a balance due from the said defendant to the said plaintiff, of the sum of 54*l.* 0*s.* 10*d.*, and they did therefore thereby award, order, and direct, the payment of such balance to be made by the defendant to the plaintiff, on or before the 31st *March*, then next, and they did thereby further award, order, and direct, that each of the said parties in difference should pay his and her own costs and charges attending the same reference. The plaintiff then alleged, that the defendant, executrix as aforesaid, did not nor would on the said 31st *March*, 1823, make payment to the plaintiff,

of the said balance, or sum of 54*l.* 0*s.* 10½*d.*, in the said award mentioned, or any part thereof, nor has she since paid the same, but wholly refused and neglected so to do.

The *second* count was similar to the first, with the exception of setting out the award in terms, and not at length. To these were added counts for money paid, and on an account stated.

The defendant pleaded, *First, non detinet*, to the whole declaration, on which issue was joined; *Secondly, plene administravit*, as to the first and second counts; and *Lastly*, that no evidence was given or offered before the said *T. R.* and *T. B.* on occasion of the said arbitration, nor did they receive any proof, nor was it admitted by or on behalf of the said defendant, that she, the defendant, as executrix as aforesaid, had, at any time before the making of the said supposed award in the said first and second counts in the declaration mentioned, in her hands, any goods, chattels, monies, or effects, which were of the said *William James Sutton*, deceased, at the time of his death, to be administered.

The plaintiff demurred to the second and last pleas; and the defendant joined in demurrer. The cause now came on for argument, when—

Mr. Serjeant *Russell*, in support of the demurrer, submitted that both the pleas were bad in law. *First*, as to the plea of *plene administravit*; although a submission by an executor or administrator is not of itself an admission of assets, yet in *Barry v. Rush* (a), where the defendant bound himself, *as administrator*, to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrator awarded that the defendant, *as administrator*, should pay a certain sum, it was held, that he could not plead *plene administravit* to an

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(a) 1 Term Rep. 691.

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action of debt on the bond;—and it was there contended, that the defendant was not bound by the terms of the award, to pay the money awarded *absolutely*, but only as administrator, out of the assets of the intestate; but Mr. Justice *Ashhurst* said: “There is no doubt but that this plea is bad; for the entering into the bond amounts to an admission of assets; and the defendant shall not afterwards be permitted to dispute it. The bond, given by the defendant, to abide by the award, was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets:” and Mr. Justice *Buller* said: “This is a bond given by the administrator, by which he bound himself, his heirs, executors, and administrators. The question then is, whether he has bound himself *personally* or not? and I think there can be no doubt but he has.” Although it may be said, that that case was qualified by the subsequent decision in *Pearson v. Henry* (a), yet that was not an action on an award, but an action of *assumpsit*, for goods sold and delivered to the defendant’s intestate, and the plea was *plene administravit* alone:—the plaintiff, in order to prove assets in the defendant’s hands, gave in evidence a submission by him as administrator, and the award itself was produced, whereby it appeared that the sum of 2,014*l.* was awarded to be due from the intestate’s to the bankrupt’s estate (whose assignee the plaintiff was), without saying *by whom it was to be paid*; and it was there contended, that, as the arbitrators had not awarded the sum found to be due from the intestate’s estate, to be paid *by the administrator*, nor had found any assets in his hands, out of which such payment was to be made, the Court could not presume assets, from the mere circumstance of the defendant’s submitting to arbitration; and Lord *Kenyon* said (b): “The case of *Barry v. Rush*, was very properly decided, but it does not affect the pre-

(a) 5 Term Rep. 6.

(b) *Id.* 7.

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sent. There, the defendant submitted in broad terms to pay whatever should be awarded, and the arbitrator did award that *he should pay a certain sum*; whereas, here, the arbitrator has only ascertained the amount of the debt due from the intestate, but has *not directed the defendant to pay it*. It is impossible then to say that the arbitrator decided that the defendant had assets, and the submission to arbitration by an administrator is not, of itself, an admission of assets." There, however, for any thing that appears to the contrary, the submission might have been merely for the arbitrators to take accounts; but here the unsettled accounts, and all matters in dispute between the plaintiff and defendant, were referred, and were to be finally settled. But the case of *Worthington v. Barlow* (a), appears to be expressly in point, and conclusive of the question. That was a motion for an attachment against the defendant, as administratrix, for non-payment of a sum awarded to the plaintiff; and, on its being contended that the defendant had no assets, and that the submission by her was not an admission of assets, Lord *Kenyon*, said: "The decision in *Pearson v. Henry* must be taken with reference to the facts of that case. There, the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it: but here the arbitrator has awarded that *the defendant, the administratrix, shall pay the plaintiff's demand*. The submission to arbitration by the administratrix was a reference not only of the cause of action, but also of the other question, whether or not the administratrix had assets. And *as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand*, it is equivalent to determining, as between these parties, that the administratrix had assets to pay this debt." So here, the arbitrators have not only

(a) 7 Term Rep. 453.

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found that there was a balance due from the defendant to the plaintiff, but that it amounted to a certain sum, which they directed her to pay him on or before a given day. In *Robson and another, assignees &c., v. —*, Lord Eldon said (a): "If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission;" and *In re Wansborough v. Dyer* (b), where an award directed the trustees of an insolvent debtor to pay costs, the Court said, "that the trustees, by entering into the arbitration bond, confessed that they had sufficient funds." So, here, as the arbitrators were empowered finally to settle certain disputes and differences between the plaintiff and defendant, it amounts to an admission by the latter that she had assets in her hands.

With respect to the last plea, that no evidence was given or offered before the arbitrators, nor did they receive any proof, nor was it admitted by the defendant, that she had assets—such plea is clearly bad. If the defendant had no assets, it would have formed part of her defence, and she ought to have shewn it; it must, therefore, be now assumed that she admitted them. If the plaintiff had brought an action against her, she must have pleaded that fact, and if she did not adduce it before the arbitrators, she must suffer for her own neglect or default. She, at all events, ought to have protested against the reference being taken as an admission of assets; and, in *Braddick v. Thompson* (c) it was held, that partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on a submission-bond conditioned for the performance of an award, but is only matter for application to the equitable jurisdiction of the Court

(a) 2 Rose's B. C. 50.

(b) 2 Chit. Rep. 40.

(c) 8 East, 344.

to set aside the award; and in a note by Mr. Serjeant *Williams* to the case of *Veale v. Warner*, he says (a): "There seems to be no case or *dictum*, where a plea of this sort has been held to be pleadable; nor a precedent of such a plea to be found in any of the books of entries." On these grounds, neither the second nor the last pleas can be supported, and the plaintiff is entitled to judgment.

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Mr. Serjeant *Storks, contra.*—The declaration is bad both in form and in substance, as the defendant is described throughout as executrix, and charged as such, and the action is founded in debt on a simple contract, which cannot be supported against an executrix. Mr. Serjeant *Williams*, in a note to *Turbill's* case (b), says, "an action of debt upon simple contract does not lie against executors or administrators, because, as they are presumed to be ignorant of the contract made by their testator or intestate, they cannot wage their law;" and *Pinchon's* case (c), *Hodges v. Jane* (d), and *Oreswick v. Armery* (e) are referred to as authorities to that effect. But, looking at the terms of the submission, and taking it altogether, it is quite clear that it was not a submission of all matters in difference between the plaintiff and defendant; but merely a reference of "certain unsettled accounts," which the arbitrators were empowered to adjust. They, therefore, have exceeded their authority by directing the defendant to pay the plaintiff a certain sum, or ordering such payment to be made by the defendant, without finding or shewing that she had assets; and they have not stated out of what fund the balance due to the plaintiff was to be paid. The differences or disputes must relate to those between the plaintiff and the intestate, and the arbitrators did not

(a) 1 Wms. Saund. 327 a, n. (3).

(b) Id. 68, n. (2).

(c) 9 Rep. 87 b.

(d) Styles, 199.

(e) Id. 228.

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state in what character the defendant was to make the payment; but they merely found a balance to be due from her to the plaintiff, which they ordered to be paid on or before a certain day; and if she had no assets she could not have been liable, nor could she be chargeable out of her own funds. In all the cases which have been relied on for the plaintiff, the submission was, in point of substance, of all matters in difference; and in *Love*, executor, v. *Honeybourne* (a), a cause, and all matters in difference between the testator of an executor and the defendant, were referred, and the arbitrator awarded that a certain sum was due to the defendant upon the balance of accounts, and directed the executor to pay the money out of the assets on a given day, without having ascertained whether, in point of fact, the executor had assets to pay the sum awarded on the day appointed, or not; and although it was held, that the award was not void for uncertainty in that respect, yet Lord Chief Justice *Abbott* said: "It is enough to say, for the present, that that part of the award which fixes the balance due is certain beyond all manner of question, though the other part of it may *not conclude the plaintiff from questioning* whether he has any assets or not to pay the money;" and Mr. Justice *Holroyd* said: "The arbitrator awards that the money shall be paid by the plaintiff out of the assets, upon a day which he fixes, *i. e.* if there are any assets in his hands at that time. If the plaintiff had fully administered at that time, he would not be bound to pay, even according to the terms of the award." In *Worthington v. Barlow*, Lord *Kenyon* said, that the submission by the administratrix was a reference, not only of the cause of action but also of the question, whether or not the administratrix had assets; and *Pearson v. Henry* is decidedly in favour of the defendant. Although, by the terms of the submission, it

(a) 4 Dow. & Ryl. 814.

was agreed, that, for the finally settling disputes and differences, the matters in dispute between the plaintiff and defendant should be referred; yet such disputes could only refer to the unsettled accounts between the plaintiff and the testator, which were the immediate antecedent; and, as the defendant was only sought to be charged in her character of executrix, she might either shew that she had no assets, or that they had been legally exhausted before she was called on to pay the sum awarded to the plaintiff. At all events, the award does not operate as a bar to any future proceedings at law between the parties; for, in *Ravee v. Farmer* (a), it was decided, that an award made upon a reference *of all matters in difference* between the parties, did not preclude the plaintiff from shewing that a particular difference did not exist at the time of the submission, or was not brought under the notice of the arbitrators; and here, as the defendant has alleged in her last plea that no evidence was given before the arbitrators that she had assets, and that she did not admit that fact, the plea is good in law, or raises matter of defence to be gone into and proved at the trial.

Mr. Serjeant *Russell* in reply.—Although it has been said, that the declaration is improperly framed, as debt on simple contract does not lie against an executrix or personal representative, yet that objection applies only to debts contracted by the testator or intestate, and not to cases where contracts are made by an executor or administrator himself. At all events, it is a mere technical objection, and, although it was held in *Barry v. Robinson* (b), that an administrator could not be sued in debt upon a simple contract of his intestate, yet it was on the ground that he could not wage his law, and, therefore, that the adminis-

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(a) 4 Term Rep. 146.

(b) 1 New Rep. 293.

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trator would be deprived of a defence which his intestate might have had; and, although the Court there denied that the wager of law had become obsolete, yet, in *King v. Williams* (a), where, to debt on simple contract, the defendant pleaded *nil debet per legem*, and applied to the Court to assign the necessary number of compurgators to wage his law, the Court discountenanced the proceeding, and refused to make any order as to the number required by law. The true distinction is, between a debt contracted by a testator, and a debt contracted by his executor or personal representative. In the one case, the doctrine of wager of law applies, but in the other it does not, as the testator, if living, could not have waged his law, the contract not being then in existence, but made by his representative after his decease. The case of *Love v. Honeybourne* is altogether distinguishable from the present, as there the arbitrator expressly directed the executor to pay the sum awarded to the defendant out of the assets in his hands, as executor: he, therefore, could not be personally liable; and here, as the arbitrators have awarded the defendant to pay the balance found to be due to the plaintiff, it is tantamount to their finding that she had assets in her hands from which that payment was to be made.

Lord Chief Justice Bxsr.—The last plea has been most ingeniously framed, and an attempt has been made by a new mode to induce us to try the merits of an award, but I am clearly of opinion that the plea is bad in point of law. This is an action of debt, brought against the defendant, as executrix of one *Sutton*, on an award, founded on an agreement between the plaintiff and the defendant as such executrix, to refer certain matters in dispute between them, respecting some unsettled accounts, to two arbitrators, who have made their award accordingly. It has

(a) 4 Dow. & Ryl. 3.

been objected, in the first place, that the declaration is bad in form and in substance, as an action of debt upon simple contract does not lie against an executor. But the principle on which that decision was founded, is, that an executor cannot wage his law of a debt contracted by his testator, as the former must be presumed to be ignorant of the nature of the contract made by the latter. Although the wager of law may not have fallen altogether into disuse, yet it has long since been considered obsolete, and ought now to be abolished and got rid of. Still, however, that doctrine can only apply to contracts or promises made by a testator, and cannot be extended to a case like the present, where the contract or undertaking to abide by the terms of the award originated with the executrix herself, who, necessarily, knew much more of the subject matter of the disputes than the testator could possibly have done, as the accounts between the two latter must have been referred to and examined after his death. It seems, too, that wager of law can only be resorted to in actions of debt upon simple contracts between the parties, without deed or specialty, and if so it cannot apply to the case of an award made in writing. *Secondly*, a question has been raised as to whether the plea of *plene administravit* is a proper plea, and affords an answer to the plaintiff's demand. I am of opinion that it does not. The case of *Robson v.* — appears to me to contain all the good sense that bears on this subject. There, the Lord Chancellor held, that a reference of all matters in dispute by assignees of a bankrupt, and an award thereupon, directing them to pay a sum of money, is conclusive upon them as to assets; and his Lordship said, that he could see no distinction between the assignee of a bankrupt and an executor or administrator; and that, if the latter thought fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to

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such an admission. If, on a reference, an executor does not protest that he has no assets in the first instance, he ought not to be allowed to do so afterwards; if he were, the opposite party would be put to the expense of the arbitration for no purpose. On principle, a submission to arbitration should be considered in the same light as if an action were brought against an executor, in which, if he omitted to plead that he had no assets, it would be presumed that he had; and he could not afterwards set it up as a ground of defence. It has been further objected, that the arbitrators have exceeded their authority, in directing payment to be made by the defendant; as, by the terms of the submission, they were limited to the investigation and arrangement of certain unsettled accounts, and finding a balance. If, indeed, the submission was confined to a mere adjustment of accounts, or the arbitrators had not directed by whom the balance was to be paid, we should be bound by the case of *Pearson v. Henry*; but the agreement, as set out in the declaration, recites, that disputes and differences had arisen and were depending between the plaintiff and defendant respecting certain unsettled accounts, and that, for the *finally settling* such disputes and differences, it was agreed that the *said matters in dispute* between the parties should be referred to the *final award* and determination of the arbitrators. Now, the obvious meaning of that is, not merely that they should take an account and ascertain the balance due, but *finally* to settle the disputes between the parties; and that could only be done by their directing payment of the balance found to be due. But, it has been said, that the arbitrators could not be authorized to direct payment without finding, or requiring evidence of, assets, and, therefore, that the last plea is an answer to the action. But an allegation that “no evidence was offered before the arbitrators, nor did the defendant admit that she had any assets of the testator in her hands before the making of the

award" is not the proper subject of a plea. If the arbitrators had misconducted themselves or improperly rejected evidence tendered to them, the proper course would be to apply to set aside the award. For any thing that appears on the face of the plea, the defendant might have admitted that she had assets, and, if she did not dispute that fact, the arbitrators were justified in presuming that she had. On these grounds, I am of opinion that the plaintiff is entitled to judgment.

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Mr. Justice PARK.—I entertain no doubt whatever in this case. The last plea goes to shew that the arbitrators have been guilty of misconduct. If so, it would be a ground for setting aside the award; for, in *Wills v. Mac-carmick* (a), partiality in arbitrators was not even allowed to be given in evidence in an action of debt upon an award; and the Court there said, "there is no case where this matter has been pleaded." On looking at the recital in the agreement, by which the disputes between the parties were referred, it appears to me to be manifest that the defendant admitted that she had assets at the time; for it is stated that certain disputes had arisen respecting some unsettled accounts, which disputes were to be *finally settled* and determined by the arbitrators: that could only be done by their directing payment of the sum they might find to be due on the balance of such accounts. With respect to the objection to the declaration, the distinction taken by my brother *Russell* appears to me to be a complete answer, and I concur with my Lord Chief Justice, that neither the second nor last pleas can be supported.

Mr. Justice BURROUGH.—The first and second counts of the declaration being founded expressly on the award,

(a) 2 Wils. 148.

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the doctrine as to the wager of law cannot apply, as the instrument was in writing. The arbitrators were empowered to take into consideration all disputes between the parties, and had also full authority to award payment in the manner they have done. If the defendant thinks she has any remedy, she may apply to a Court of equity, where an inquiry may be instituted whether she has assets or not. If she has, there can be no doubt but that the plaintiff is fairly and justly entitled to them; and it appears to me that she admitted that she had assets, when she agreed that the unsettled accounts should be referred and adjusted.

Mr. Justice GASELER.—On looking at the record, I thought the point so clear, that I did not expect that any attempt would be made to support either the second or last pleas, and I am now clearly of opinion that the plaintiff is entitled to judgment. There is no ground whatever for the objection with respect to the wager of law; as the contract on which the action is founded, was entered into by the defendant, as executrix, since the death of the testator; and, although that proceeding is not obsolete, yet it appears, from the case of *King v. Williams*, that the Court would not assist a party resorting to it. With respect to the question of assets, independently of what was said by Lord *Eldon*, in *Robson v. —*, I have always understood the rule to be, that a submission to arbitration by an executor, is, in general, considered as a reference, not only of the cause of action, but also of the question whether or not he has assets; and that when an arbitrator has awarded an executor to pay a certain sum of money, as in *Worthington v. Barlow*, it is equivalent to his determining that assets existed. By the terms of the agreement, it must be implied that the defendant had assets at the time, and unless she protested against it before the arbitrators, they were empowered to award payment in the manner they

have done. Although the defendant might have pleaded that a particular matter in difference was notified to the arbitrators before their award was made, and that they neglected to decide upon it, according to the case of *Mitchell v. Staveley* (a), still the plaintiff might have replied that no such matter was subjected to the arbitrators' consideration, by which he would call on the defendant to prove the fact, as was done in *Ravee v. Farmer*; but, as the plea tends to impute misconduct to the arbitrators, it is clearly bad, according to the cases of *Wills v. Maccarmick*, and *Braddick v. Thompson*.

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Judgment for the plaintiff.

(a) 16 East, 58.

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Monday,
 Nov. 24th.

THIS was an action of trespass for breaking and entering the plaintiff's close, called the yard, and pulling down and destroying his wall, and converting the materials thereof to the defendant's own use. The defendant pleaded, *First*—not guilty. *Secondly*—a private foot-way, by prescription. *Thirdly*—a common and public way on foot, along the said close. *Fourthly*—that the defendant was seised of a messuage or dwelling-house, near to and adjoining the close, and that he and his servants had a foot-way from the door of the said house, along and over the close, to fetch and carry water, at all times of the year. *Fifthly*—that the defendant had a foot-way over and along

In trespass for breaking and entering the plaintiff's close, the defendant pleaded not guilty, and seven special pleas justifying under a right of way. The plaintiff joined issue on the plea of not guilty, traversed the other pleas, and new assigned *extra viam*. The defendant joined issue on the traverses, and suffered judgment by

default on the new assignment. The Jury found a verdict for the plaintiff with one shilling damages, on the plea of not guilty, and assessed the damages on the new assignment at 40*l*. and the defendant had a verdict on one of the special pleas:—*Held*, that the plaintiff having been compelled to go down to trial on the general issue, he was entitled to the general costs of the cause; and it seems that the defendant ought to have withdrawn the general issue when he suffered judgment by default on the new assignment.

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the close at all times. *Sixthly*—that he had a right to pass and repass over the close, to go to a place for water: and *Lastly*—the defendant justified pulling down the wall, as it obstructed an ancient light or window in his said dwelling-house. The plaintiff, in his replication, joined issue upon the plea of not guilty, and traversed the right of way and obstruction, as alleged in the special pleas, and new assigned *extra viam*. The defendant joined issue on the traverses in those pleas mentioned, and suffered judgment by default, on the new assignment.

At the trial, before Mr. Justice *Bayley*, at the last Assizes at *York*, the Jury found a verdict for the plaintiff, on the plea of not guilty, with one shilling damages, and on all the other issues joined on the special pleas, except the fourth, on which a verdict was found for the defendant. The damages on the judgment by default, on the new assignment, were, by the recommendation of the learned Judge, and consent of the parties, assessed at forty shillings, on an understanding that the amount should make no difference, nor affect the question as to the costs.

Mr. Serjeant *Cross*, on a former day in this Term, obtained a rule calling on the plaintiff to shew cause why the *postea* should not be delivered over to the defendant or his attorney, and he submitted, that, as the defendant had obtained a verdict on the fourth plea, which embraced all the substantial merits of the cause, as the only question was, whether he had a right to go over the plaintiff's close to obtain water from a common or public watering place, he was entitled to the general costs of the cause.

Mr. Serjeant *Wilde*, now shewed cause. The case of *House v. The Treasurer to the Commissioners of the Thames and Isis Navigation* (a), is expressly in point, to

(a) 6 B. Moore, 324; S. C. 3 Brod. & Bing. 117.

shew, that, under the circumstances, the plaintiff is entitled to his general costs. There, in an action of trespass for breaking and entering the plaintiff's closes, the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment; and the plaintiff was bound to go to trial, to get rid of the general issue, which would otherwise have barred his whole action, and he could not, by any other means, have obtained damages on the judgment by default:—it was held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the Jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted (but not allowed to him) on that issue. So, in *Longden v. Bourn* (a), in trespass for cutting down trees, the defendant pleaded not guilty, and several other pleas, justifying the cutting down the trees, as a nuisance for obstructing a highway; to which the plaintiff replied, joining issue on the plea of not guilty, and denying the highway; and new assigned cutting down the trees *extra viam*; and the defendant joined issue on the special pleas, and suffered judgment by default on the new assignment:—The Jury having found a verdict for the plaintiff on the general issue, and for the defendant on the issues on the special pleas, and assessed damages on the new assignment—it was held that the plaintiff was entitled to full costs, except upon the issues on the special pleas; and that the defendant was not entitled to costs, even on those issues. In a note to the case of *Green v. Jones* (b), it is said: “As the slightest excess is sufficient to entitle the plaintiff to a verdict on a new assignment, which, according to several decisions, gives him all the costs, it is evidently very

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(a) 1 Barn. & Cress. 278.

(b) 1 Wms. Saund. 5th Edit. 300, (a), n. [f].

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dangerous for the defendant to plead to the new assignment, and hence the observation of the learned Serjeant, (*Williams*) that 'in most cases it is a prudent thing to let judgment go by default on the new assignment.' For, though the doing so ensures the plaintiff his costs as far as such judgment; yet, if he proceed to trial on the special plea, and fail, the defendant will be entitled to the general costs; for the plaintiff might have entered a *nolle prosequi* as to that plea, and assessed his damages on the new assignment before the Sheriff—*Thornton v. Williamson* (a). The defendant, however, must take care that a plea of not guilty to the declaration be *not left entire* on the record, when judgment by default is suffered on the new assignment; for, if it be, it is held that the plaintiff cannot assess his damages before the Sheriff, but is compelled to go to trial on such plea of not guilty, notwithstanding the judgment by default; and that this brings the case within that class in which it is determined, that, where the plaintiff succeeds in part of his demand, and fails in the rest, he is entitled to the general costs, deducting his costs on those parts in which he fails, but not allowing the defendant his costs thereon: but that, where the defendant suffers judgment by default as to part, and succeeds on *all* the issues as to the rest, he is entitled to the general costs, in like manner as he is when he succeeds on any *one plea* which goes to the *whole cause* of action. Perhaps the proper mode of entering the judgment by default to the new assignment may be somewhat in this form: 'And the said defendant, relinquishing his said plea by him first above pleaded to the said declaration, so far as the same plea relates to the said trespasses above newly assigned, says nothing in bar or preclusion of the said trespasses above newly assigned, wherefore, &c.' There is nothing incongruous in this, for the new assignment is virtually contain-

(a) 13 East, 191.

ed in the declaration, and it is on that ground entirely that the judgment in *House v. The Thames Commissioners*, proceeds." That appears to be founded on a sound principle, and is precisely in point; for here, as the defendant had not withdrawn the general issue of not guilty, but left it entire on the record, he thereby compelled the plaintiff to go down to trial; and as he obtained a verdict upon the issue on that plea, he is entitled to the *postea*, and to the general costs of the cause.

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Mr. Serjeant *Cross*, in support of his rule.—The defendant having obtained a verdict on a plea which raised the only material question between the parties, and which in substance embraced the whole and the substantial cause of action, he is entitled to the general costs of the cause. The subject-matter of dispute was the plaintiff's having erected a wall to prevent the defendant and others from procuring water at a spring; and, as it was considered a public nuisance, he was perfectly justified in abating it, and the Jury have so found. The case of *Longden v. Bourn* is distinguishable, as there the damages were assessed for the plaintiff at 100*l.* on the new assignment, whilst here, the damages were merely nominal, and were not to affect any question that might arise as to the costs. In *House v. The Treasurer of the Thames Navigation*, the declaration contained several counts, and several distinct trespasses were charged, and the defendant pleaded a licence *to part* only, on which plea alone he obtained a verdict; and the learned Judge who tried the cause certified that the trespass was wilful and malicious. Here, however, the plaintiff was not obliged to go to trial, as he might have let judgment go by default on the issue which was found against him; and, in *Thornton v. Williamson* (a), where one issue was found for the defendant, he

(a) 13 East, 191.

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was held to be entitled to the general costs of the trial, although another issue was found for the plaintiff. But the latest decision on this subject is that of *Other v. Calvert* (a), where, in trespass *quare clausum fregit*, some issues were found for the plaintiff, and others for the defendant, and the Court took time to consider as to the plaintiff's right to costs; and Mr. Justice *Park*, in delivering the judgment of the Court, said, that "the point had been fully considered in *Benett v. Coster* (b), where the Court felt themselves bound by the authority of *Vivian v. Blake* (c), which established the principle, that a plaintiff has, in no case, a right to costs, except where he is entitled to judgment on the whole record; and that, where the defendant obtains a verdict on an issue to a plea which goes to *the whole* of the plaintiff's cause of action, the defendant is entitled to the general costs of the cause, and the plaintiff to the costs of those issues only which are found for him; and that the costs of those issues mean the costs of the pleadings only." And, in *Harber v. Rand* (d), in trespass for breaking and entering the plaintiff's close, the defendant pleaded a public right of way over it, and the plaintiff took issue thereon, and new assigned the trespass *extra viam*, upon which the defendant suffered judgment to go by default; and, at the trial, the Jury found a verdict for the defendant on the right of way, and one shilling damages, *by consent*, on the new assignment: it was held, that the defendant was entitled, on the issue found for him, to the general costs of the trial; and that the plaintiff was entitled, on the new assignment, to no more costs than damages. The principle to be deduced from all the cases is, that, where issues are found both for the plaintiff and defendant, the Courts look at the merits of

(a) 8 B. Moore, 239; S. C. 1 Brod. & Bing. 465.
Bing. 275. (c) 11 East, 263.
(b) 4 B. Moore, 110; S. C. 1 (d) 9 Price, 336.

the case; and, if a verdict be found for the latter, which goes to the whole cause, or the substance of the action, he is entitled to the general costs.

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Lord Chief Justice BEST.—The question raised in this case appears to me to have been decided by this Court and the Court of *King's Bench*, in *House v. The Treasurer of the Thames and Isis Navigation*, and in *Langden v. Bourn*, to which we were referred by my brother *Wilde*. The pleadings in those cases were precisely the same as here, *viz.* not guilty, upon which issue was joined; and several special pleas of justification under a right of way, and a licence, which pleas were traversed by the plaintiff in his replication, and he new assigned *extra riam*. The defendant suffered judgment by default on the new assignment, and the Jury found a verdict for him on the issues joined on the special pleas, and for the plaintiff on the plea of not guilty; and it was held, in the former case, that, as the defendant, by pleading the general issue, made it necessary for the plaintiff, in order to get rid of that plea, to go down to trial, he was entitled to the general costs of the cause. Here, the defendant might and ought to have withdrawn his plea of not guilty, when he suffered judgment to go by default on the new assignment, as the plaintiff could not assess his damages before the Sheriff. In *Harber v. Rand*, it appears that the defendant only pleaded a justification of a right of way, without the general issue, which distinguishes it from those cases to which I have before adverted, and by which we must be bound. Although it has been said, that, if a verdict be found for the defendant on an issue which goes to the merits of the cause, or the substance of the action, he is entitled to the general costs, yet that is not the principle on which we must decide. We can only look at the record; and if the defendant has incumbered it with an

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unnecessary plea, he must suffer for it. The general issue of not guilty had nothing to do with the justice or merits of the case. The sole ground of defence for pulling down the wall, was, that it obstructed the defendant from obtaining water from a well or spring; and, by allowing the plea of not guilty to stand, it went to the whole of the trespasses laid in the declaration, and amounted in fact to a total denial of having pulled down the wall. The plaintiff, therefore, was put to the expense of calling witnesses to prove the whole trespass. I agree to the mode suggested by the learned editors of Mr. Serjeant *Williams's* notes to *Saunders's* Reports (of the value of which it is impossible to speak too highly), that the defendant ought not to have left the plea of not guilty entire on the record.

Mr. Justice PARK.—I think this case falls expressly within the principle established in *House v. The Treasurer of the Thames Navigation*, in which case I fully concurred with the Court in the judgment delivered by the late Lord Chief Justice *Dallas*; and that decision is strengthened by the case of *Langden v. Bourn*.

Mr. Justice BURROUGH.—The merits of the case are entirely out of the question, on a motion of this description. We can only look at the record; and, as the defendant allowed the general issue to stand, after having suffered judgment by default on the new assignment, he compelled the plaintiff not only to go down to trial, but to be at the expense of proving the whole of the trespasses laid in the declaration; and, as the Jury have found a verdict for him on that plea, he is entitled to the general costs.

Mr. Justice GASELEE.—The cases of *House v. The Thames Navigation*, and *Langden v. Bourn*, appear to me

to be precisely in point; and the case of *Harber v. Rand* is distinguishable, as there the defendant merely pleaded a justification of a right of way.

Rule discharged (a).

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(a) The same point was determined by the Court of *Exchequer* in the case of *Booth v. Ibbotson*, 1 *Younge & Jervis*, 354, where the defendant pleaded the general issue to the whole declaration, and justified as to part of the trespasses, and the plaintiff newly assigned, to which the defendant suffered judgment by default, and the Jury found a verdict for the plaintiff on the general issue, with one shilling damages, and assessed the damages up-

on the new assignment at one farthing, with forty shillings costs; and it was held, that the plaintiff, being bound to go down to trial to get rid of the general issue, which would otherwise have barred his whole action, he was entitled to his full costs of the trial, although the Jury found a verdict for the defendant upon the special pleas, which covered part of the trespasses; the costs of the issues on such pleas being deducted, but not allowed to the defendants.

AMNER and Another, Executors of BURROWS, deceased,
v. CATTELL, the Elder.

Monday,
Nov. 24th.

A RULE *nisi* was obtained by Mr. Serjeant *Adams*, on a former day in this Term, on the part of the defendant, that the venue in this case might be changed from *London* to *Warwickshire*, on an affidavit, which stated that the cause of action, if any, arose in the county of *Warwick*, and not (as laid in the declaration) at *London*, or elsewhere out of the county of *Warwick*.

The defendant having obtained a rule *nisi* to change the venue from *London* to *Warwick* on the usual affidavit, cause was shewn on an affidavit of the plaintiff's attorney, which stated that the defendant's attorney had said that he should change the ve-

Mr. Serjeant *Merewether* afterwards shewed cause, on

nue, as the statute 9 *Geo.* 4, c. 14, would come into operation before the cause could be tried, and that he should thereby defeat the plaintiff, as he had no promise in writing. *Best*, C. J., and *Park*, J., were of opinion that the venue ought not to be changed. *Burrough*, J. and *Gaselee*, J., thought otherwise, and that the defendant's attorney should be allowed to answer the affidavit; but, as he failed to do so satisfactorily, the rule was eventually discharged.

It seems that the first section of the statute 9 *Geo* 4, c. 14, has a retrospective operation, and applies to parol acknowledgments made before its provisions came into effect.

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an affidavit of the plaintiffs' attorney, which stated, that, previously to the commencement of the action, he wrote to the defendant's attorney, informing him of the defendant's admissions and promises of payment of the debt sought to be recovered by the plaintiffs in this suit, and the names of the witnesses to prove the same; that, instead of serving the defendant with a copy of a *capias* issued in the cause, he called on his attorney for his undertaking for the defendant's appearance; when such attorney informed him, the deponent, that he should plead the statute of limitations, and that Lord *Tenterden's* act came into operation upon the 1st *January* next, and that he should change the venue and beat the plaintiffs, as they had no promise in writing. The learned Serjeant submitted, that, under these circumstances, the Court would not countenance the application, or allow the defendant to receive a benefit by so gross an act of injustice, as his only object to change the venue, was to postpone the trial of the cause until after the statute 9 *Geo. 4*, c. 14 came into operation, and by which the plaintiffs' claim would be altogether defeated; as the 1st section of the act must be taken to apply to parol acknowledgments made before its provisions came into effect (*a*).

(*a*) Which, after reciting the statute, 21 *Jac. 1*, c. 16, by which it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract, without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of

the then present Session of Parliament, or within six years next after the cause of such actions or suit, and not after: and that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactment, and that it is expedient to prevent such questions, and to make provisions for giving effect to the said enactment, and

Mr. Serjeant *Adams* in support of his rule.—As the defendant has been guilty of no irregularity, the Court will not try the matter upon affidavit, and he is clearly entitled to have the venue changed, as he has sworn in the usual terms, that the plaintiffs' cause of action arose in *Warwickshire*, and not elsewhere; and the venue can only be retained, by the plaintiff's undertaking to give material evidence in *London*. At all events, the defendant's attorney ought to be allowed to answer the affidavit made by the attorney for the plaintiff, which was not only irregular, but affords no ground for discharging the rule, which was applied for on the usual and ordinary terms.

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Lord Chief Justice BEST.—I am of opinion that the venue in this case ought not to be changed; and, in so deciding, we shall not defeat the object of the late statute, or do any thing inconsistent with its provisions. I have often regretted the introduction of a loose promise or bare acknowledgment of a debt, by which a case is taken out of the operation of the statute of limitations, as it was not within the original meaning or spirit of the act. But, by discharg-

to the intention thereof:—it is enacted, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or

administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them:—Provided always, that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." And by the 10th section it is enacted, that "the act shall commence and take effect on the 1st *January*, 1829."

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ing this rule, we shall carry into effect the intention of the noble Lord who framed the late act, and the Legislature who sanctioned it and directed it to pass; and it seems to me, that it was intended to apply to parol acknowledgments made before its provisions came into operation, because it was with a view to prevent an *ex post facto* operation with respect to suits already commenced, that the period of the act's coming into force was postponed for six months after it had passed, it having received the royal assent on the 9th *May*, 1828, and not coming into operation till the 1st *January* following; and, if the trial of this cause were delayed till the Assizes, the act would have come into effect, and the plaintiffs would be prevented from giving in evidence a parol promise by the defendant, so that their claim against him would, as has been truly said, be altogether defeated. Whether the statute applies to all actions commenced before the 1st of *January*, I do not take upon myself now to decide; but, acting on the spirit of the Legislature in introducing the postponing clause, we ought not to prevent the plaintiff from trying his cause, if he be prepared to do so, at the Sittings after this Term, and within the time limited by the new statute for the continuance of the old law. But it has been said, that the plaintiffs can only retain the venue by undertaking to give material evidence in *London*, where it was laid. To that, however, I do not accede; for I have known a variety of other causes shewn; for instance, if the cause of action arose in two counties, if the witnesses reside in a distant county, or if a fair and impartial trial cannot be had in that where it was originally laid, or under other special circumstances, where the justice of the case requires it; and if a plaintiff relies on an obligation or promise which would avail him but for the mere postponement of a trial, it would be an act of injustice to him to delay it; and the Legislature did not mean to deprive him of any remedy he might have had previously to the time of the trial, at

which it appears to me the new statute was only to take effect.

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Mr. Justice PARK.—I am of the same opinion. I agree with my Lord Chief Justice, that, on motions by defendants to change the venue on the usual affidavit, other causes may be shewn against the rule, than imposing on the plaintiff the terms of his undertaking to give material evidence in the county in which the venue was originally laid. In the *King's Bench*, as the rule to change the venue is absolute in the first instance, the only way by which the plaintiff can bring it back, is by a separate motion; but, in this Court, as the rule is only a rule *nisi*, it may be made absolute or discharged on shewing cause, according to circumstances; and it may be discharged on several special grounds, as the illness of a material witness, or, in an action for goods sold and delivered, that they were sold elsewhere than where the venue was laid, or that the cause of action arose abroad, or out of the jurisdiction of the Court.—With respect to the recent statute, which requires a written memorandum, to render certain promises or engagements binding; or, in other terms, to make a party liable in respect of a debt extinguished by force of the statute of limitations; no one approves of it more than myself, and the public at large ought to feel themselves under the greatest obligation to the noble Lord who framed it. But, as it is yet in its infancy, we must be careful not to work injustice by seeking to further or extend its object. This being a transitory action, and the plaintiffs having a right to bring it wherever they pleased, they laid the venue in *London*, where the cause might be tried at the Sittings after this Term, and before the new act came into operation; but the defendant now seeks to defeat the plaintiffs' claim, although it is not denied that it is a just one, by removing the cause to *Warwick*, where the Assizes would not be held until the Spring of the next year, the statute

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coming into force on the first day of that year. It appears to me, that, when the Legislature gave parties six months before allowing the act to operate, it indicated an intention to enable them in the meantime to sue on parol promises, which they would be afterwards prohibited from doing: and as the motive of the defendant in applying to change the venue is apparent from the affidavit of the plaintiffs' attorney, which has not been contradicted, I think we should be doing great injustice by allowing this application to prevail.

Mr. Justice BURROUGH.—I at first thought that this rule ought to be made absolute, and still incline to be of the same opinion. The defendant moved to change the venue on the usual affidavit, that the plaintiff's cause of action (if any) arose in the county of *Warwick*, and not elsewhere. The plaintiffs have not denied it; and, as the defendant has not been guilty of any irregularity, the plaintiffs ought to have given an undertaking to give material evidence in *London*, where the venue was originally laid; and if either they or their attorney have any cause of complaint against the defendant or his attorney, it should have been made the subject of a separate motion, so as to allow the defendant's attorney an opportunity of answering the affidavit adduced in shewing cause against the rule, which appears to me to contain matter altogether distinct and foreign to it. In justifying bail by affidavit, if it be sworn that the bail are incompetent to justify, either from not having sufficient property, or from any other cause, the Court will allow them to answer the matters of the affidavit. So, here, it would lead to the greatest inconvenience if the plaintiffs could, on shewing cause against the usual application by the defendant to change the venue, introduce any extraneous matter in an affidavit, which the defendant could have no opportunity of answering. I therefore think, that, in this case, the defendant's attorney ought to be allowed to answer the affidavit of the plaintiffs' attorney, as the Court

cannot assume that it is true, or founded on fact: but, if the affidavit be not satisfactorily answered, I agree with my Lord Chief Justice, and my brother *Park*, that this rule should be discharged.

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Mr. Justice GASELEE.—As my Lord Chief Justice, and my brother *Park*, think that this rule ought to be discharged, it is unnecessary for me to express any opinion; but I concur with my brother *Burrough*, and think the rule should be made absolute. I agree, that it is competent to a plaintiff, on shewing cause against a rule by the defendant to change the venue, on the usual affidavit, to shew some special ground, other than undertaking to give material evidence in the county in which he has laid it; but we may, when circumstances require it, enlarge the rule, to allow the defendant an opportunity of answering the matters in the plaintiff's affidavit. But, whether this rule be made absolute or discharged, we must look at the law, and consider the practice as it now stands, and not at what is to take place hereafter. The action being founded on a contract of a transitory nature, the plaintiffs had their election to lay the venue where they pleased; and on their having laid it in *London*, the defendant swore that the cause of action (if any) arose in the county of *Warwick*, and not elsewhere, out of that county; and, under the law as it now stands, the plaintiffs have shewn no cause why the venue should not be changed. But it has been said, that, as the 9 *Geo.* 4, c. 14, would come into operation before the cause could be tried at the Assizes, the plaintiffs' right of action would be altogether defeated, as a parol promise or acknowledgment by the defendant could not then avail them. By discharging this rule, we should, in effect, be encouraging all parol promises and suits upon them, from the 9th *May*, when the act received the royal assent, to the 1st *January* next, when it would come into operation; which appears to me to be contrary to the intent and spirit of the act, as

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I think it applies to all parol acknowledgments made from the time of its passing. At all events, I think the defendant's attorney should have an opportunity of answering the affidavit of the plaintiffs' attorney.

The Court ordered the rule to be enlarged, for this purpose, and—

Mr. Serjeant *Adams* now admitting that the defendant's attorney had not satisfactorily denied the language imputed to him in the affidavit of the plaintiffs' attorney—

Rule discharged (a).

(a) See *Ansell v. Ansell*, 3 Carr. & Payne's N. P. C. 563, where the statute of limitations was pleaded, and the only evidence to take the case out of the statute was a parol acknowledgment, and it was submitted for the defendant that, since the statute 9 Geo. 4, such an acknowledgment was not sufficient; and for the plaintiff it was insisted, that as the action was commenced before the 1st January, 1829, when that act came into operation, its provisions did

not apply:—Lord Chief Justice *Tenterden* was of opinion, that the words of the act had relation to the time of the trial, and therefore, that the parol promise was not sufficient evidence to take the case out of the operation of the statute.—And see a note by the reporters, where it is said, that there have been several decisions at *Nisi Prius*, in accordance with the opinion expressed by Lord *Tenterden*, although there was no case determined in *Banc*.

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HEMMING and COX v. PERRY.

Tuesday,
Nov. 25th.

THIS was an action of *assumpsit* to recover the sum of 178*l.* 16*s.* 6*d.*, the value of certain fixtures alleged to be the property of the plaintiffs, and agreed to be purchased from them by the defendant. The *first* count of the declaration stated, that, in consideration that the plaintiffs, at the special instance and request of the defendant, had agreed to sell and deliver to him certain fixtures of great value, in manner therein after mentioned, the defendant promised the plaintiffs to take them at a fair appraisement thereof between the plaintiffs and defendant, and to pay the plaintiffs such sum as should be found, on such appraisement, to be payable for the same. The plaintiffs then averred, that the fixtures were fairly appraised by a person selected and chosen on behalf of both parties, to wit, one *T. W.*, at the sum of 178*l.*, whereof the defendant had notice; and that, although the plaintiffs were ready and willing to deliver the fixtures to the defendant upon his paying the said sum of 178*l.*, and requested him to take them at such appraisement, and pay for the same accordingly; yet that he would not take or pay for them, but wholly refused and neglected so to do. To this were added counts for fixtures bargained and sold, goods sold and delivered, and the usual money counts.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the last Sittings in this Term, it appeared that the plaintiffs were assignees under a commission of bankrupt issued against one *Croft*, who, at the time of his bankruptcy, was possessed of a beneficial lease of premises in *Oxford Street*, where he carried on his business, that

The defendant having purchased the lease of a house at a public auction, he afterwards wrote to the auctioneer, requesting him to send the key, and stating, that his auctioneer was desirous of taking an inventory of the fixtures. The auctioneers accordingly met, and, disagreeing as to the valuation, appointed an umpire, to whom they inclosed an inventory, stating the fixtures to be the property of the plaintiffs, and valued to the defendant. The umpire made a valuation, and appraised the fixtures at a certain sum, and returned the inventory with an appraisement duly stamped. The defendant, by letter, afterwards requested the plaintiffs' auctioneer to remove the fixtures, which was done; and, on the following day, the defendant wrote the

plaintiffs that he would attend at the house and pay them the amount of the fixtures, as settled by the appraisers. The first and last letters were signed by the defendant, but the first only was stamped:—*Held*, that one stamp was sufficient, as it fell within the proviso in the statute 55 *Geo.* 3, c. 184, Sched. part 1, tit. "*Agreement*:"—held also, that, taking the inventory, appraisement, and correspondence together, they established a sufficient memorandum of the contract to satisfy the terms of the statute of frauds.

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the lease was mortgaged to the executors of the bankrupt's late brother, and was disposed of under an order of the commissioners, by public auction, and that the defendant became the purchaser; that there was a quantity of fixtures on the premises which had passed to the plaintiffs, as assignees; that, after the sale of the lease to the defendant, a *verbal* application was made to him by a Mr. *Davies*, the plaintiffs' auctioneer, to take them; that the defendant consented to do so at a valuation, and appointed Mr. *Squibb*, of *Saville Row*, as his valuer; that, on 13th *December*, 1827, being a short time after the sale, the defendant wrote the plaintiffs' auctioneer as follows:—

“ Sir,—I shall feel obliged if you will send by bearer the key of No. 63, *Oxford Street*. Mr. *Squibb* is desirous of taking an inventory of the fixtures, when he will appoint an early day for a meeting. I am your obedient servant.

Geo. Perry.

“ To Mr. *Davies*, 43, *Watling Street*.”

That, on the 18th *December* following, Mr. *Squibb* wrote the plaintiffs' auctioneer as follows:—

“ *Saville Row*.

“ Messrs. *Squibb & Son* beg to acquaint Mr. *Davies* that they have gone over the fixtures in *Oxford Street*, and are ready to meet him to settle the amount, and beg an appointment for that purpose.

“ To Mr. *Davies*.”

That, in pursuance of this letter, Mr. *Squibb* and Mr. *Davies* met, but were unable to agree as to the price of the fixtures; and that they appointed a Mr. *Warklers*, an appraiser, as umpire; and, on the 8th *January*, 1828, inclosed him an inventory in the following letter:—

“ Sir—You are requested to value the fixtures as *per* inventory (as umpire). The inventory to be sent to the *Bolt-in-Tun*, *Fleet Street*, on *Thursday* morning.

“ *Tuesday*, *January* 8th.”

That the inventory inclosed was thus headed:—

“ An inventory of the fixtures on the premises No. 63, *Oxford Street*, the property of the assignees of *George Croft*, a bankrupt, valued to Mr. *George Perry* (the defendant).”

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That *Warlters* valued the fixtures, and returned the inventory with the following appraisement on the proper stamp:—

“ The articles mentioned in the foregoing inventory are appraised at 178*l.* 16*s.* 6*d.* by

Thomas Warlters, Umpire.

“ *January* 10th, 1828.”

It further appeared, that a correspondence afterwards took place between the plaintiffs' auctioneer and the defendant, in which the latter gave the former notice to remove the fixtures; and the attorney for the mortgagees having served a like notice on the plaintiffs, they gave up the key of the premises to him; and, on the 25th *January*, the fixtures were removed accordingly, and on the following day, the defendant sent a notice to the plaintiffs and to their auctioneer, as follows:—

“ I hereby give you notice, that, on *Monday* next, I shall attend on the premises, No. 63, *Oxford Street*, at three o'clock, or at any other reasonable time or place that you may appoint, and will then pay you the amount of the fixtures, as settled by the appraisers, on your giving me possession thereof, in the state and condition they were in at the time of the valuation, agreeably to the inventory taken by the said appraisers. Dated this 26th *January*, 1828.

George Perry.”

On the above correspondence being given in evidence, it appeared that the defendant's letter of the 13th *December*, 1827, was the only one that was stamped; when it was objected for him:—*First*, that the subsequent letters were not admissible;—and *Secondly*, that there was no

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sufficient agreement in writing, or memorandum signed by the party to be charged, or his authorised agent, to satisfy the provisions of the 4th section of the statute of frauds, as fixtures cannot be considered or treated as goods and chattels; and the case of *Colegrave v. Dias Santos* (a) was relied on, where the owner of a freehold house, in which there were various fixtures, sold it by auction, and nothing was said about the fixtures, and a conveyance of the house was executed and possession given to the purchaser, the fixtures still remaining in the house; and it was held, that they passed by the conveyance of the freehold, and were not the subject of an action of trover. His Lordship, however, was strongly inclined to think that there was no weight in either of the objections, and that, taking the appraisement and correspondence together, they established an agreement on the part of the defendant to take the fixtures at a valuation, and that the umpire who valued them must be considered as the agent of both the plaintiffs and defendant. The Jury accordingly found a verdict for the plaintiffs for the amount of the fixtures as valued.

Mr. Serjeant *Taddy* now applied for a rule *nisi* that this verdict might be set aside and a nonsuit entered, or a new trial granted.—*First*, the letter from *Squibb & Son* to *Davies*, the plaintiffs' auctioneer, and their letter to *Warlters* to value the fixtures, as well as the subsequent correspondence between the defendant and *Davies*, were not receivable in evidence, as they were not stamped. By the statute 55 Geo. 3, c. 184, Sched. Part 1, tit. "*Agreement*," a stamp of 1*l.* is imposed on an agreement, or any minute or memorandum of an agreement, where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instru-

(a) 2 Barn. & Cress. 76; S. C. 3 Dow. & Ryl. 255.

ment, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto; and, although it is thereby provided, that, “where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*; yet that can only apply to a correspondence between two parties, *viz.* the one making the original communication, and the person who answers it; and here, *Davies* was a mere auctioneer or agent of the plaintiffs, and acted on their behalf as assignees of the bankrupt. Besides, the subsequent correspondence had no reference to the original communication made by the defendant to *Davies*, which was clearly not sufficient to bind him, within the meaning of the statute of frauds. There must not only be a memorandum in writing, signed by the party to be charged, but it should also contain the terms of the contract, and the price agreed on; and, according to the case of *Wain v. Warlters* (a), which has been since recognized and acted on as established law, the consideration for the promise, as well as the promise itself, must appear upon the face of the written engagement. Although, in *Saunderson v. Jackson* (b), it was held, that a subsequent letter, written and signed by the vendor, referring to or recognizing a contract, might be connected with a bill of parcels already delivered, so as to make a sufficient memorandum of the contract to satisfy the statute; yet, in *Richards v. Porter* (c), where *A.* sent to *B.* on the 25th *January*, an invoice of five pockets of hops, and delivered them to a carrier to be conveyed to *B.*, and in the invoice *A.* was described as the seller, and *B.* as the purchaser of the hops; and *B.* afterwards wrote to *A.*, stating that the hops he bought of him on the 23rd *January* were not yet arrived, that he received the invoice, that the last hops were longer on the road

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(a) 5 East, 10.

(b) 2 Bos. & Pul, 238.

(c) 6 Barn. & Cress. 437.

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than they ought to have been, and that, if those he ordered last did not arrive in a few days, he must get some elsewhere:—it was held, that the invoice and letter, taken together, did not constitute a note in writing of the contract to satisfy the statute. The letter of the defendant to *Davies*, of the 13th *December*, 1827, is clearly not equivalent to an agreement to take the fixtures at a valuation; and, even if it were, it would be impossible to ascertain what were included in the inventory without resorting to parol proof. Although, in *Schneider v. Norris* (a), it was held, that a letter recognizing an invoice or bill of parcels, is such evidence of the contract as to take a case out of the mischief which the statute was intended to prevent; yet here, none of the subsequent correspondence between the defendant and *Davies* had reference to the original letter, in which he only stated that *Squibb* was desirous of taking an inventory. The letters by *Squibb* to *Davies* and by them to *Walters* have no signatures, nor was there any subsequent authority by the defendant recognizing the antecedent agreement. The cases of *Allen v. Bennett* (b) and *Jackson v. Lowe* (c) are distinguishable from the present, as there the subsequent letters referred expressly to the original contract; or as Mr. Justice *Park* said in the latter case (d), “the notice not only states the terms of the original contract, but specifies the quantity and quality of the article to be delivered, as well as the price, and the time for its delivery.”

Lord Chief Justice BEST.—I am of opinion that there is no pretence for either of these objections. It is only necessary to look at the terms of the contract as laid in the first count of the declaration, and see whether it is not supported by the letters and other documentary evidence to which we have been referred. It is not necessary to

(a) 2 Man. & Selw. 286.

Bing. 9.

(b) 3 Taunt. 169.

(d) 7 B. Moore, 228.

(c) 7 B. Moore, 219; S. C. 1

dispute the authority of the case of *Wain v. Warlters*, which has been since recognized and adopted; but I thought at *Nisi Prius*, and I still retain the same opinion, that all the allegations in the first count of the declaration were proved by the written evidence, with the exception of the agency of the umpire who made the valuation. It is quite clear that he might have been appointed by parol; and, when appointed, he was the agent of both parties. The declaration alleges, that the defendant promised to take the fixtures at a fair appraisement; and by his first letter of the 13th *December*, he appointed *Squibb* as his agent to value them, and stated to the plaintiffs' auctioneer that *Squibb* was desirous of taking an inventory. In consequence of this letter, the two appraisers afterwards met, and, as they could not agree in the valuation, they appointed an umpire; and, although this appears to have been done without consulting their principals, and there was no signature to the request made to *Warlters* to value the fixtures, yet the inventory was inclosed to him, and the appraisement was duly made. But it appears that the defendant refused to take the fixtures at the valuation fixed by the umpire, in consequence of which, they were removed at the request of the attorney of the mortgagees, who had a primary interest in the lease; but after the removal, the defendant played a trick on the plaintiffs and their auctioneer, by giving them notice that he was ready to pay the amount of the fixtures *as settled* by the appraisers. It is, therefore, clear that the defendant lay by, until, by the removal of the fixtures, the plaintiffs were prevented from performing their agreement; but the notice is in terms an admission of the existence of the original contract to purchase the fixtures at the price to be fixed by the appraisers, as it refers to the valuation settled by them. Taking, therefore, the inventory, appraisement, and correspondence together, they appear to me to establish a sufficient agreement in writing on the part of the defendant

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to take the fixtures at a valuation, and also to amount to a sufficient memorandum to satisfy the terms of the statute of frauds. It has been said, that, as only the first letter of the defendant was stamped, the subsequent correspondence was not receivable in evidence; but I am of opinion that it was, as the whole of it may be considered as part of, and forming one entire contract; and as the first letter was the material document, and was properly stamped, it was sufficient.

Mr. Justice PARK.—I am of opinion that there is no ground for the objection with respect to the stamp, as it falls expressly within the proviso in the statute 55 *Geo. 3*, that, where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it is sufficient if any one of them be stamped.—I also think that there is as little ground for the objection that has been raised as to the statute of frauds, particularly when the whole of the transaction is looked at. The defendant became a purchaser of fixtures which belonged to a bankrupt, the property in which passed to the plaintiffs, as his assignees, and *Davies* was their auctioneer or appraiser. The defendant wrote to him as such, and desired him to send the key of the house, the lease of which he had also purchased, and stated that *Squibb*, the defendant's auctioneer or appraiser, was desirous of taking an inventory of the fixtures, and that he would appoint an early day for a meeting. In consequence of this, *Squibb* acquaints *Davies* that he has looked over the fixtures, and that he was ready to meet him to settle the amount. Passing by the valuation by the umpire, the defendant, by his last notice, states that he was ready to pay the amount of the fixtures *as settled by the appraisers*. That appears to me to refer to the original letter; and, as both were signed by the

defendant, it was sufficient to take the case out of the operation of the statute.

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Mr. Justice BURROUGH.—This case will not at all trench upon the decision in *Wain v. Warlters*, nor the subsequent cases in which that case has been recognized and confirmed. Although it has been held, that fixtures form part of, and pass by the conveyance of the freehold; yet that is not so according to the general understanding of the world. It is evident that these parties intended that they should not be included in the sale of the lease. With respect to the objection as to the non-admissibility of the subsequent letters, as they all related to one fact, and formed the subject-matter of one and the same agreement, I am of opinion that the stamp on the first rendered the whole receivable in evidence.

Mr. Justice GASELEE.—It is unnecessary in this case to disturb the decision of *Wain v. Warlters*, or the subsequent cases in which it has been acted upon. I at first doubted whether this case did not fall within that of *Champion v. Plummer* (a), where it was held that a note or memorandum in writing of a contract for the sale of goods, signed by the seller only, was not a sufficient memorandum within the meaning of the statute of frauds. But, coupling the first letter of the defendant, which may be considered as the key of the contract, with the appraisal and subsequent notice by him, it appears to me to be enough to satisfy the terms of the statute. The auctioneers, *Davies* and *Squibb*, were appointed to appraise and value the fixtures, the one acting on behalf of the plaintiffs, and the other named by the defendant himself. They accordingly met, and as they could not agree in their valuation, they appointed a third person as an umpire; and it must be assumed, that the defendant had know-

(a) 1 New Rep. 252.

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ledge of that fact, as in his last notice he stated that he was ready to pay the amount of the fixtures, namely the fixtures belonging to the plaintiffs, as settled by the appraisers. It appears to me that there is no ground for the objection as to the stamp; and there was no irregularity in making the inventory, which was returned to the appraisers by the umpire, with a proper appraisement stamp.

Rule refused.

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[E. T. 8 Geo. 4, Roll 372.]

Wednesday,
Nov. 26th.

To an action of debt on bond, conditioned for paying the plaintiff the sum of 10,000*l.* upon his forming a company and procuring purchasers for nine thousand shares, which company, was to carry on a distillery according to a process for which a patent had been granted: the defendant pleaded—that the patent contained a proviso that if the patentee should transfer or assign the benefit thereof to any number of persons exceeding five, the patent should be void; and that it was

intended at the time of making the bond, that the company should consist of more than five persons and to be formed for the purpose of using and enjoying the privileges of the patent, and of the acting as a corporate body and dividing the benefit of the patent into ten thousand shares, to be transferrable and assignable, without any charter from the King; and that it was corruptly and illegally agreed between the plaintiff and defendant that the plaintiff should form the company for such purposes as in the plea mentioned:—*Held*, on general demurrer, that this plea was good, and an answer to the action.

THIS was an action of debt on bond. The defendant cravedoyer of the bond and condition, which were set out at length. By the former, it appeared, that the bond was dated on the 13th *July*, 1825, and by which *Jean Jacques Saint Marc*, *Stamp Brooksbank*, and *William Dorset Fellowes* (the defendant), became jointly and severally bound to the plaintiff, in the sum of 10,200*l.* The condition was as follows:—“Whereas the said *Jean Jacques Saint Marc*, some time since obtained three several letters patent for the distillation of potatoes; and whereas, the said *Jean Jacques Saint Marc*, *Stamp Brooksbank*, and *William Dorset Fellowes*, are now engaged in co-partnership together, in carrying on a certain distillery, to a very large extent, at *Vauxhall*, called the *Belmont Distillery*, according to the system and method of distilling, for the use and exercise of which the said several letters patent were granted to the said *Jean Jacques Saint Marc*: and which said distillery has been erected, set up, and es-

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tablished, on certain leasehold hereditaments and premises, belonging to them the said *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes*; and whereas the said *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes*, have it in contemplation to dispose of their shares and interest, of, in, and to, the said several patents, and of, in, and to, the distillery, premises, plant, and stock in trade in and upon the same, and to part with the same to a company, to be formed for that purpose; and whereas the said *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes*, have applied to, and requested *Aimé Duvergier* (the plaintiff) to exert his influence amongst his numerous connexions and friends, so as to form such company, intended to be called 'The Patent Distillery Company,' who shall appoint directors and trustees for the conduct and management of the said concern; and that such directors shall issue under their hands and seals, ten thousand shares, of the value of 50*l.* each share; and whereas the said *Aimé Duvergier* (the plaintiff) in consequence of his connexion with different merchants, brokers, traders, and others, in the city of *London*, hath consented and agreed to form the said company, to be called, 'The Patent Distillery Company,' among his own immediate connexions and friends, and to bring such persons together, for the purpose of appointing directors and trustees for the government and management of such distillery concern, and to procure purchasers for nine thousand shares, of the value of 50*l.* each share; and whereas the said *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes*, in order to induce the said *Aimé Duvergier* (the plaintiff) to take the trouble of forming such company, and to use his influence amongst his connexions and friends, and to indemnify him from the charges and expenses that he may be put unto in and about the same, have proposed and agreed, as soon as he, or his executors

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or administrators, shall have effected such object, and procured purchasers for nine thousand of such 50*l.* shares, and obtained for such company the first call upon such shares, of 5*l.* each, that they, the said *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes*, their heirs, executors, or administrators, or some or one of them, shall and will pay to the said *Aimé Duvergier*, his executors, administrators, or assigns, the full sum of 10,000*l.* sterling, by three equal payments or instalments, of 3,333*l.* 6*s.* 8*d.*, *viz.* the sum of 3,333*l.* 6*s.* 8*d.* so soon as the first instalment on such nine thousand shares shall have been paid; the sum of 3,333*l.* 6*s.* 8*d.* so soon as the second instalment on the same shares shall have been paid; and the remaining sum of 3,333*l.* 6*s.* 8*d.*, so soon as the third instalment on the same shares shall have been paid:—Now, therefore, the condition of the above-written bond or obligation is such, that, if the above bounden *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes*, their executors, or administrators, or any or either of them, do and shall well and truly pay, or cause to be paid, unto the above-named *Aimé Duvergier*, his executors, administrators, or assigns, the full sum of 10,000*l.*, of lawful money of *Great Britain*, in manner following, that is to say: the sum of 3,333*l.* 6*s.* 8*d.*, part thereof, on the said *Aimé Duvergier*, his executors, or administrators, forming the said before-mentioned company, and procuring purchasers for such nine thousand shares, and payment of the first instalment or call thereon; the further sum of 3,333*l.* 6*s.* 8*d.*, on the second instalment on such shares having been paid; and the remaining sum of 3,333*l.* 6*s.* 8*d.* on the third instalment on the same shares having been paid: then, the above-written obligation to be void and of no effect, or else to be and remain in full force and virtue."

The defendant pleaded, *First—non est factum. Secondly*—That, as to the said sum of 3,333*l.* 6*s.* 8*d.*, part of the said sum of 10,000*l.*, in the condition of the bond

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first mentioned, the plaintiff had not, at any time since the making of the said bond, hitherto, formed the said company in the condition mentioned, and procured purchasers for such nine thousand shares therein mentioned, and payment of the first instalment or call thereon, according to the true intent and meaning of the said condition, but had wholly omitted and neglected so to do; and as to the said further sum of 3,333*l.* 6*s.* 8*d.* in the said condition mentioned, that the said second instalment of such shares in the said condition mentioned, had not, at any time since the making of the bond, hitherto, been paid according to the true intent and meaning of the said condition, but the same and every part thereof, was still unpaid: and as to the remaining sum of 3,333*l.* 6*s.* 8*d.* in the said condition mentioned, that the said third instalment on the same shares in the said condition mentioned, had not, at any time since the making of the bond, hitherto, been paid according to the true intent and meaning of the said condition; but the same and every part thereof was still unpaid.

Thirdly—That the plaintiff had not, at any time since the making of the bond, formed the company in the condition mentioned.

Fourthly—That the plaintiff had not, at any time since the making of the bond, hitherto, procured purchasers for such nine thousand shares as in the said condition were mentioned.

Fifthly—That the plaintiff ought not to have or maintain his action against the defendant, because he said that certain of the said several letters patent, in the said condition of the said supposed writing obligatory mentioned, were letters patent of our sovereign Lord the now King, under the great seal of the united kingdom of *Great Britain and Ireland*, bearing date at *Westminster*, on a certain day, to wit, the 20th *March*, in the *fifth* year of the reign of our Lord the King, whereby—after reciting (amongst other things) that the said *Jean Jacques Saint Marc* had, by

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his petition, humbly represented unto our said Lord the King, that, in consequence of communications made to him by certain foreigners residing abroad, and discoveries by himself, he was in possession of an invention of improvements in the process of an apparatus for distilling—our said Lord the King gave and granted unto the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, his especial license, full power, sole privilege and authority, that he the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, and every of them, by himself, and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said *Jean Jacques Saint Marc*, his executors, administrators, or assigns, should at any time agree with, and no other, from time to time and at all times thereafter, during the term of years therein expressed, should and lawfully might make, use, exercise, and vend, the said invention within that part of the united kingdom of *Great Britain* and *Ireland* called *England*, our said Lord the King's dominion of *Wales*, and town of *Berwick-upon-Tweed*, in such manner as to him the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, or any of them, should in his or their discretion seem meet; and that the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising, by reason of the said invention, for and during the term of years therein mentioned; to have, hold, exercise, and enjoy, the said license, powers, privileges, and advantages, thereinbefore granted, or mentioned to be granted, unto the said *Jean Jacques Saint Marc*, for and during, and unto the full end and term of *fourteen* years, from the date of the said last-mentioned letters patent next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided:

and it was by the said letters patent provided, *and the same were declared to be upon the express condition*, that, if the said *Jean Jacques Saint Marc*, his executors, or administrators, or any person or persons who should or might at any time or times thereafter, during the continuance of that grant, have or claim any right, title, or interest, in law or equity, of, in, or to, the power, privilege, and authority, of the sole use and benefit of the said invention thereby granted, should make any transfer or assignment, or any pretended transfer or assignment, of the said liberty and privilege, or any share or shares of the benefit or profit thereof, or should declare any trust thereof, to or for any number of persons exceeding the number of *five*, or should open, or cause to be opened, any book or books for public subscription to be made by any number of persons exceeding the number of *five*, in order to the raising any sum or sums of money under pretence of carrying on the said liberty or privilege thereby granted, or should, by him or themselves, or his or their agents or servants, receive any sum or sums of money whatsoever, of any number of persons exceeding in the whole the number of *five*, for such or the like intents or purposes, or should presume to act as a corporate body, or should divide the benefit of the said last-mentioned letters patent, with the liberties and privileges thereby granted, into any number of shares exceeding the number of *five*, or should commit or do, or procure to be committed or done, any act, matter, or thing, whatsoever, during such time as such person or persons should have any right or title, either in law or equity, in or to the same premises, which would be contrary to the true intent and meaning of a certain act of Parliament, made in the *sixth* year of the reign of the late King, *George the First* (a), intituled: “An act for better securing certain powers and privileges intended to be

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(a) 6 Geo. 1, c. 18.

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granted by his Majesty, by two charters, for assurance of ships and merchandizes at sea, and for lending money upon bottomry; and for restraining several extravagant and unwarrantable practices therein mentioned:" or, in case the said power, privilege, or authority, should, at any time thereafter, become vested in, or in trust for, more than the number of *five* persons, or their representatives, at any one time, reckoning executors or administrators as and for the single person whom they represent, as to such interest as they were or should be entitled to in right of such their testator or intestate—that then, and in any of the said cases, those letters patent, and all liberties and advantages whatsoever thereby granted, should wholly cease and become void, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding:" as by the said letters patent, which said letters patent the defendant brought into Court, might more fully appear. And the defendant further said, that others of the said letters patent in the condition of the said writing obligatory mentioned, were and are certain letters patent of our said Lord the King, under the seal of our said Lord the King, appointed by the treaty of union to be used instead of the grand seal of *Scotland*, bearing date on a certain day, to wit, the *26th February*, in the *fifth* year aforesaid: by which last-mentioned letters patent, our said Lord the King gave and granted to the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, his special license, full power, sole privilege and authority, that the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, by themselves or such other persons as he or they might appoint or agree with, and no others, from time to time and at all times thereafter, during the term of years in the said last mentioned letters patent expressed, might lawfully make, use, exercise, and vend, any invention therein mentioned, of improvements in the process of and apparatus for distilling, within that part of the

united kingdom of *Great Britain* and *Ireland* called *Scotland*, in such manner as to the said *Jean Jacques Saint Marc*, his executors, administrators, and assigns, or any of them, should in his discretion seem meet. [Here, the term of *fourteen* years for which the *Scotch* patent was granted, and the proviso therein contained, were set out *in totidem verbis* as in the *English* patent]. And the defendant further said, that the said several terms of fourteen years each in the said letters patent mentioned, at the time of the making of the said supposed writing obligatory, were and yet are unexpired; and that the said company in the said condition of the said supposed writing obligatory mentioned, was meant and intended by the said *Jean Jacques Saint Marc*, the said plaintiff, and the said defendant, at the time of the making of the said supposed writing obligatory, to consist of more than *five* persons, to wit, *ten thousand* persons, and to be formed for the purposes (amongst other things) of using, exercising, and enjoying the said exclusive liberties and privileges in the said two several letters patent in the said condition and in this plea mentioned, for the use and benefit of the said persons so exceeding the number of *five*, in that part of the united kingdom called *England*, and in that part thereof called *Scotland*, respectively, under colour of the said letters patent, respectively, to wit, at &c.: and so the defendant said that the supposed writing obligatory was and is void in law: and this, &c., wherefore &c.

Sixthly—Actionem non, &c., because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our sovereign Lord the now King, under the great seal of the united kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster*, on a certain day, to wit, the 20th *March*, in the *fifth* year of the reign of our said Lord the King, containing therein the like matters and things, and the like proviso, and to the same effect, as the said letters patent in the said fifth plea first mentioned; as by the

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said letters patent, which the defendant produced to the Court, might more fully appear: and the defendant further said, that the said term of fourteen years in the said last-mentioned letters patent mentioned, at the time of the making of the said supposed writing obligatory, was and yet is unexpired, and that the said company in the said condition of the said supposed writing obligatory mentioned, was, at the time of the making thereof, intended by the plaintiff and defendant to consist of more than *five* persons, to wit, *ten thousand* persons, and to be formed for the purpose (amongst other things) of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of *five*, in that part of the united kingdom called *England*, under colour of the said last-mentioned letters patent: By means of which premises in this plea mentioned, the supposed writing obligatory was and is wholly void: and this &c., wherefore &c.

Seventhly, and Lastly—Actionem non, &c., because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our sovereign Lord the now King, under the great seal of the united kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster*, on a certain day, to wit, the *20th March*, in the *fifth* year of the reign of our said Lord the King, containing therein the like matters and things, and the like proviso, and to the same effect, as the said letters patent in the said *fifth* plea first mentioned; as by the said last-mentioned letters patent, which the defendant produced to the Court, might more fully appear: and the defendant further said that the said term of *fourteen* years in the said last-mentioned letters patent mentioned, at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired; and that the said company in the said condition of the said supposed writing obligatory mentioned, was, by the said *Jean*

Jacques Saint Marc, the said *Stamp Brooksbank*, the said defendant, and the said plaintiff, intended, at the time of the making of the said supposed writing obligatory, to consist of more than five persons, and to be formed for the purpose (amongst other things) of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of *five*, in that part of the united kingdom called *England*, under colour of the said letters patent, and of the acting as a corporate body, and dividing the benefit of the said last-mentioned letters patent, and the liberties and privileges thereby granted, into divers shares exceeding the number of *five*, to wit, *ten thousand*, to be transferable and assignable, without any charter from our Lord the King; and that, before the time of the making of the said supposed writing obligatory, to wit, on &c., at &c., aforesaid, it was corruptly and illegally agreed by and between the plaintiff and the said *Jean Jacques Saint Marc*, the said *Stamp Brooksbank*, and the said defendant, that the said plaintiff should form such company as in this plea mentioned, for the purposes in this plea mentioned, and should sell and dispose of divers, to wit, *nine thousand* of such shares, as in this plea mentioned, being the shares in the said condition of the said supposed writing obligatory mentioned; and should cause divers large sums of money to be subscribed by public subscription, by numbers of persons exceeding *five*, to wit, *nine thousand* persons, in order to the raising a large sum of money, to wit, 450,000*l.* under pretence of carrying on the said liberty or privilege (amongst other things) by the said letters patent granted; such money to be in part received by the said *Jean Jacques Saint Marc*, *Stamp Brooksbank*, and the said defendant, for the purpose of carrying on the said liberty and privilege for the benefit of the said last-mentioned persons so exceeding *five* (amongst others); and that the said *Jean*

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Jacques Saint Marc, the said *Stamp Brooksbank*, and the said defendant, should, in consideration thereof, pay to the said plaintiff the sum of 10,000*l.* of lawful &c., in the manner in the said condition of the said supposed writing obligatory mentioned; and that, for securing the payment of the said sum of 10,000*l.*, the defendant should make and seal, and as his own act and deed deliver, to the plaintiff, a writing obligatory in the penal sum of 10,200*l.*, conditioned for the payment of the said sum of 10,000*l.* in manner aforesaid:—and the defendant further said, that, in pursuance of the said corrupt and unlawful agreement, the defendant afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, made and sealed, and as his deed delivered, the said supposed writing obligatory in the said declaration mentioned, and the plaintiff then and there accepted and received the same of and from the defendant, upon the said corrupt and unlawful agreement: by means of which premises in this plea mentioned, the said supposed writing obligatory was and is wholly void: and this &c., wherefore &c.

The plaintiff added a *similiter* to the *first* plea, replied to the *second*, *third*, and *fourth*, and demurred generally to the *fifth*, *sixth*, and *last*.

The defendant rejoined, taking issue on the plaintiff's replication to the *second*, *third*, and *fourth* pleas; and joined in demurrer to the three last.

The demurrer came on for argument on a former day in this term, when—

Mr. Serjeant *Wilde*, in support of the demurrer.—The first point raised by the *seventh* plea, which embraces and incorporates all the material matters contained in the *fifth* and *sixth*, is, whether or not the parties mentioned in the bond *intended*, among other acts, to form a company which should act as a corporate body, and have transferable shares, without the sanction of a charter from the

Crown. The company the plaintiff proposed to form, was a condition precedent to any claim for remuneration, and was to be under the guidance of directors. The plaintiff was merely to bring persons together, for the purpose of appointing directors and trustees for the government of the concern, and to procure purchasers for shares. The company was not to be raised on any regulations or stipulations previously agreed upon; and it does not appear that the assent of the subscribers was required to any act but the making of the purchase. No arrangement was entered into as to whether the company should act by charter or not, nor was there any previous stipulation to that effect. But it is alleged in the seventh plea, that the company intended to act as a corporate body, and that it should have transferable shares, without a charter. That allegation, therefore, embraces two questions, *first*, whether the company were to act as a corporate body; and *secondly*, whether the capital or benefit to be derived from the concern, was to be divided into transferable shares, without a charter. There is no allegation in the plea, as to the intent or meaning of the parties; and although the introductory part refers to their intention to act as a corporate body, and divide the benefit of the patent into transferable and assignable shares, without any charter from the King, yet no agreement to that effect is stated or shown. The mere allegation of *intention* is not sufficient to shew that the bond was void; for it is not to be assumed that an intent to commit an illegal act must necessarily be followed by actual commission. Whether the parties intended to act as a corporate body, is a question of law, to be deduced from certain facts, which should have been set forth in the plea. Although individuals may assume to take upon themselves to act as a corporation, yet no offence can be committed until they actually do so. There is a wide distinction between persons claiming to act as a corporate body, and persons usurping corporate offices.

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A *quo warranto* will lie against a person assuming to act as a *public* officer; but it will not where a *private right* is only in question. In the case of *The King v. Cann* (a), a *quo warranto* for holding a court leet was refused: and it was alleged in argument, that it had always been refused in the case of warrens (b); and the Court said, that the matter might very properly be tried in a civil action. Where individuals merely assume to act as a corporation in a private matter, the only consequence is, that their acts are void; and here, the parties merely intended to carry on a trade, which in strictness must be considered as a private concern; nor could it be of any detriment to the public, nor in fact to any individual, neither was it an usurpation on the prerogative of the crown. It cannot be presumed from a mere general allegation of intent, that the parties meant to act illegally. The bond upon the face of it discloses no illegality, and it might have been intended that the shares should be assigned under an act of Parliament to be procured for the purpose, or under a charter with the sanction of the crown. At all events, it must be assumed, that the parties intended to act by legal means, unless the contrary be shewn. The allegation that the company intended to act as a corporation, raises a mixed question of law and of fact, and offers matters to be tried by a Jury. The shares in the patent were transferable without the aid of a charter; they might be assigned to any number of persons the grantees might think fit, and they could not be excluded from any legal means by which that object might be effected; but the parties might intend to become a corporation, by procuring an act of Parliament for the purpose. The statute 6 *Geo. 1*, c. 18, recognizes the ordinary modes by which public com-

(a) *Andrews*, 15.

Ibbotson's case, Cas. temp. Hardwicke, 261.

(b) See the *King v. Lowther*, 2 Ld. Raym. 1409; S. C. 1 Str. 637;

panies are legalized, namely, by charter and by statute; and here, the plaintiff was not a member of the company, and there was nothing to prevent him from procuring a charter, or, at all events, it might have been his intention that the company should be legalized by an act of Parliament; and, as he might have had recourse to that measure, it is not for the defendant to object that he did not obtain it. In *Haines v. Busk* (a), it was held to be no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such, that, if the charterer failed to obtain certain licenses, the voyage would be illegal; and Lord Chief Justice *Gibbs* said, "that if the licenses had not been procured, it was not the fault of the innocent plaintiff, but of the criminal defendant, and, therefore, that he should not take advantage of the want of them." Here, the defendant should have shewn what the intended acts were, in order that the Court might judge whether they were peculiar to a corporate body or not; and, if the procuring a statute were contemplated in the first instance, there is nothing to shew that the proposed acts were illegal. There is nothing to prevent a company from transferring and assigning shares without a charter from the crown, nor is it in itself unlawful; if it were, partners in banking-houses who might so do, would render their firms illegal associations. The statute 6 *Geo.* 1 was passed to remedy an existing evil; and, in the case of the *King v. Webb* (b), it was decided, that the mere creation of transferable shares did not render a concern illegal. There, a great number of persons covenanted by a deed of co-partnership to raise a large capital by small subscriptions, in shares; but it was held, that, as the shares were not generally transferable at the mere unrestricted option of the holders, but to a certain extent only, it did not amount to the raising or pretending to raise transferable stock,

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(a) 5 Taunt. 521; S. C. 1 Marsh. 191.

(b) 14 East, 406.

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which was one of the nuisances prohibited by the statute; and here, it is not averred that the shares of the company were to be transferable as matter of right, or without any limitation or restriction. In *Pratt v. Hutchinson* (a), it was held to be no objection upon the statute, to articles of agreement, whereby fifty persons agreed to raise two hundred shares at 210*l.* each, by small monthly subscriptions, for building houses for each other, every holder paying interest on his shares till paid up; with a stipulation for the members to employ certain tradesmen only in the building, with power to each member to sell his shares and transfer them in the books of the society, *provided that the purchaser should be approved at a meeting of the society, and should, on his admission, become a party to the original articles*; for there is nothing illegal *per se* in the general object, or in the mode of executing it; nor is such a limited power of transferring the shares a raising of transferable stock within the mischief of the act. In the case of a partnership, the sheriff may seize under an execution, and sell, a share of one of the partners. So, in the case of a bankruptcy, the commission transfers the property of a bankrupt to his assignees, who may carry on his trade. At all events, a partner may assign all his interest, although it may depend on the terms of the partnership deed, whether the assignee should carry on business with the others or not. The cases of *Smith v. Stokes* (b), and *Smith v. Oriell* (c), are decisive to shew, that, under a separate commission against one partner of a firm, the assignees take all the separate property, and all the bankrupt's interest in the joint property: and that they are tenants in common, from the time of the act of bankruptcy, with the solvent partner. Although the agreeing to transfer shares might be imprudent, it does not follow that it would be illegal;

(a) 15 East, 511.

(b) 1 East, 363.

(c) Ibid. 363.

and, though in *Josephs v. Pebrer* (a)—where an association, calling themselves the “Equitable Loan Bank Company,” professed to have a capital in shares, which shares were to be transferable without any restriction, and the holders were to be subject to such regulations as might be contained in any act of Parliament passed for the government of the society, and in the mean time to such regulations as might be made by a committee of management, and no evidence was given as to the particular objects or tendency of the company—it was held, that the company was to be considered illegal, and within the operation of the 6 Geo. 1, as having transferable shares, and affecting to act as a body corporate, without authority by charter or act of Parliament: yet there, the company was not only formed, but an agent had been appointed and employed, and the trade had actually begun, and was carrying on, before any authority to legalize or sanction it was applied for. Here, however, the bond only related to the future establishment of the company, which, when formed, it is alleged, was intended to act as a corporate body, and to have transferable shares; but, as there can be no legal objection to the transfer of such shares, and it does not appear that the plaintiff was even to be a member of the company, and the money mentioned in the bond was to be paid to him on his bringing persons together for the purpose of appointing directors and trustees for the government of the concern, and to procure purchasers for the shares, it was a service for which he was clearly entitled to a remuneration, and was wholly distinct from the mode in which the concern was eventually to be carried on. After the plaintiff had procured purchasers for the shares, the business of the distillery was to be carried on by the shareholders, and the plaintiff had no means of controlling the appointment of directors and trustees, nor could he exercise

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(a) 3 Barn. & Cress. 639; S. C. 5 Dow. & Ryl. 542.

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any authority as to the management of the establishment; and as the defendant has not shewn or alleged any illegal acts *done* by the company, but merely an *intention* to commit them, the pleas are no answer to the action; neither are the means by which the company might have been legalized negatived or denied: nor was it intended that the exclusive right of distilling spirits from potatoes, secured by the patent, was intended to be conveyed, but the proposed company were merely exonerated from all liability to the patentee for using his invention; and it does not appear from either of the pleas that the plaintiff was aware of the proviso in the patent, limiting the transfer of the shares; and, even if he were, the insertion of such a proviso was not required by law.

Mr. Serjeant *Taddy, contra.*—In *Fox v. Hanbury* (a), Lord *Mansfield* said: “An act of bankruptcy by one partner is, to many purposes, a dissolution of the partnership, by virtue of the relation in the statutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade.” That is the true principle; but the facts in this case do not raise a question involving the rights of partners. The plaintiff, by his demurrer, admits that it was intended that the company should act as a corporate body, and that they should have transferable shares, without a charter from the Crown; but it has been said, that the particular mode in which the company intended to act should have been stated in the pleas, in order that the Court might ascertain whether such acts were attributable to a corporate body or not. This, however, was altogether unnecessary; but, even if it were, the plaintiff could only have taken advantage of it by special demurrer: by demur-

(a) Cowp. 448.

ing generally, he has allowed that he intended to form a company that was to act as a corporation. The *seventh* plea must be taken with reference to the condition of the bond, by which the first instalment was to be paid on the plaintiff's forming the company and procuring the purchasers for the shares; and the three several instalments were to indemnify him from the expenses he might be put to in such formation. Three obligations were imposed on him,—*first*, to form the company;—*secondly*, to bring persons together for the purpose of appointing directors and trustees for the government of the concern;—and *lastly*, to procure purchasers for the shares; and, upon the first call upon such shares, the first instalment was to be paid; and it is distinctly alleged in the plea, that it was corruptly and illegally agreed between the plaintiff and the defendant, that the plaintiff should form the company for the purposes in that plea mentioned, which are, that the company should act as a corporate body, and divide the benefit of the patent into shares exceeding *five* in number, *viz. ten thousand*, which were to be transferable and assignable without any charter from the king. That, too, is admitted by the demurrer; and, although it has been said, that the assignment of the letters patent was not illegal, still, as they would be rendered void by the proviso, if assigned for the benefit of more than five, the persons who were intended to be shareholders, and to form the company, would be cheated and inveigled into the purchase of a thing of no value; and, it appears on the face of the record, that a fraud was intended on the crown, on the public at large, and on all those who might be induced to become purchasers of shares. The agreement is therefore void, as being contrary to public policy. The statute 21 *Jac.* 1, c. 3, legalizes patents under certain circumstances, and Lord *Coke*, in treating of that statute, says (*a*), that, in every new

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(a) 3rd Institute, 184.

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manufacture that deserves a privilege, there must be *urgens necessitas*, and *evidens utilitas*; that it must not be *to the hurt of trade*, nor *generally inconvenient*; and that, if either of these qualities fail, the privilege is declared by the act to be void. Here, the inconvenience is the presuming to act as a corporate body, and the transferring, or pretending to transfer or assign shares, without legal authority, either by act of Parliament, or by charter from the crown; and either the one or the other was absolutely requisite to warrant the company to act as a body corporate or to transfer shares; each of which not only tends to the prejudice of trade, but falls expressly within the provisions of the 18th section of the 6 Geo. 1, c. 18; and the seventh plea is framed with a reference to that act. But an extensive or uncontrolled transfer of shares is not only inconvenient, but an offence at common law, as it is not confined to the mere transfer, but by it all the rights and interests of the parties are assigned; and it is a well known and established principle that a *chose in action* is not assignable at law. In *Coke Littleton* it is said (a), “that no entry, nor re-entry, may be reserved or given to any person, but only to the feofor, or to the donor, or to the lessor, or to their heirs;” and Lord Coke says (b), “that the reason thereof is, for avoiding of maintenance, suppression of right, and stirring up of suits; and, therefore, nothing in action, entry, or re-entry can be granted over.” Again, it is laid down in *Coke Littleton* (c), “that, by the ancient maxim of the common law, a right of entry, or a *chose in action*, cannot be granted or transferred to a stranger, and thereby is avoided great oppression, injury, and injustice.” In *Josephs v. Pebrer*, the association was deemed to be illegal for affecting to act as a corporate body without being authorized to do so by law, *viz.* by charter, or by statute; and there, the only object of the association was the encouragement of trade, by ad-

(a) Section 347.

(b) 214 a.

(c) Co. Litt. 266 a.

vancing money to needy persons, at a lower rate of interest than licensed pawnbrokers were by law entitled to demand; and Lord Chief Justice *Abbott* there said (a): "If the projectors, before the association has been sanctioned, either by an act of the Legislature, or by a royal charter, make shares in the concern transferable, without any restriction, at the mere will of the holder, and provide that the purchasers shall render themselves liable to regulations, to be framed by certain persons styling themselves a committee of management, or directors, then the association assumes an unlawful shape." Here, the shares were to be transferable without any limit or restriction, at the option of the holders; and if there was to have been any restriction, the plaintiff should have shewn it, as well as its terms and conditions. In *Josephs v. Pebrer*, directors were to be appointed, as in this case: and Lord Chief Justice *Abbott*, asked (b):- "What was the grievance and prejudice which the association tended to cause to his Majesty's subjects? It appears (said he) that these shares, upon each of which only 1*l.* was paid, were sold at 5*l.* 10*s.* premium; and unless we shut our eyes altogether to what is going on in the world, we cannot help observing, that, in other companies and associations, the sale and transfer of shares at enormous premiums is carried on to a greater extent than was ever known, except at the period when the statute referred to (6 *Geo.* 1) was passed. The necessary effect of such a practice is to introduce gaming and rash speculation to a ruinous extent. In such transactions one cannot gain unless another loses; whereas, in fair mercantile transactions, each party, in the ordinary course of things, reaps a profit in his turn." Although the statute 6 *Geo.* 1, has been lately repealed, as far as it relates to the restraining several extravagant and unwarrantable practices in the 6 *Geo.* 1 mention-

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(a) 3 Barn. & Cres. 641.

(b) *Ib.* 644.

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ed; and also for conferring additional powers upon his Majesty, with respect to the granting of charters of incorporation to trading and other companies (a); yet the cases that have been decided as to its construction are most material to shew that an agreement similar to that described in the seventh plea is illegal, as it tends to the prejudice and grievance of the King's subjects, and if that be so, it is quite clear that it is void at law. Mr. Justice *Bayley*, in *Josephs v. Pebrer* (b), distinguishes that case from *The King v. Webb*, and *Pratt v. Hutchinson*, as, in the one, the shares were not transferable at the mere unrestricted option of the holder; and, in the other, no person could become a member of the company, until he had made himself a party to the partnership articles, and been proposed and approved by a certain majority of persons present at a meeting of the society. "But," said that learned Judge, "the present case manifestly tends to the common grievance of many of his Majesty's subjects, and falls within the description of illegal societies, given by the 6th Geo. 1, c. 18, s. 18." In the case of *Kinder v. Taylor*, where a question arose as to the legality of a company calling itself, *The Real del Monte Mining Company*, Lord *Eldon* is stated to have said, that (c), "the question as to what was assuming to act as a corporate body, was rendered still more important to be decided, because it was impossible to read the 6th Geo. 1, and the clauses of exceptions contained in it, without seeing that the Legislature thought itself bound to except even some legally chartered companies. The case of *The King v. Webb*, so much dwelt upon, was scanty in argument, and the common law was not considered in it, because that was an indictment upon the statute. He (the Lord Chancellor)

(a) See the statute 6 Geo. 4, c. 91.

(b) 3 Barn. & Cress. 645.

(c) George on Joint Stock Companies, p. 46.

spoke with all respect of Lord *Ellenborough*, who had decided the case, and whose memory he venerated as a lawyer, but he should have been glad if his Lordship had taken the trouble to state what was assuming to act as a corporation. For many considerations, it would have been very fortunate, if the Court had then looked at this as a distinct question, and had been good enough to declare, ‘this is not acting as a corporation, because, to act as a corporation, you must act so and so.’ It now, however, became necessary to decide, either by legal judgment, or by a declaratory act of Parliament, what is the meaning of presuming to act as a corporation; and by whomsoever it was declared, not only what was doing, but what had been done, must be attentively regarded. It was for this reason he thought the case of *The King v. Webb* called for further explanation. His Lordship then, after commenting on the statute 6 *Geo.* 1, which he observed was an ill drawn act, said that, “he was of opinion (a), and he had taken some trouble to consider the question, that, if it could satisfactorily be made out to a Jury, that a party was opening books, raising a premium upon the shares, and then took care to get himself out of the scrape, that was an indictable offence.” In *Buck v. Buck* (b), it appeared that the “*British Ale Brewery*,” was a public company, neither incorporated by charter nor by act of Parliament; that its stock was raised by public subscription, and that its shares were transferable; and it was held, that the company was within the 6 *Geo.* 1, c. 18, although it was insisted that it was the object of the brewery to carry on a lawful trade in a lawful manner, and to furnish to the public at a cheap rate, and of a good quality, an article of the first necessity; and therefore that it was a public benefit, instead of a nuisance. Here, too, the transfer or assignment of shares to more than five persons is clearly illegal, and the plaintiff must or ought to have known of the proviso in the patent limiting the assignment

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(a) Ibid. 47.

(b) 1 Camp. 547.

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of shares to that number, as the patent is referred to in the condition of the bond on which the present action is founded, and, with the contents of which, it must, at all events, be assumed that the plaintiff was cognizant; and more particularly so, as a patent is not a mere grant from the crown, but must be generally known, as its object is for public services and for public benefit. The *seventh* plea expressly alleges that the plaintiff intended, at the time of making the bond, that the company should consist of more than five persons, and that the benefit of the patent should be divided into ten thousand shares, to be transferable and assignable without any charter from the King. This the plaintiff has admitted by the demurrer; and if the transaction between him and the defendant had gone a little further, he would have been liable to an indictment, on the authority of the case of *The King v. Stratton* (a), where, on its appearing that a society, called "The Philanthropic Annuity Society," was an unincorporated company, with transferable shares, Lord *Ellenborough* said: "That the society was certainly illegal, and that, in *Dodds's* case (b), all the Judges of the Court of *King's Bench* were agreed upon the illegality of these associations." Yet it has been said, that the plea does not negative the intention of procuring an act of Parliament for the purpose of legalizing the company, but the plaintiff should have alleged that fact, for it was impossible for the defendant to know whether such an application was intended or not. The object of passing an act of Parliament is to effect an alteration in the existing law, and here it was enough for the defendant to allege that the plaintiff meant to contravene it; but a charter from the crown is the usual and ordinary course by virtue of which companies similar to the present are formed and established; and here it must be inferred that the proposed company intended to act as a corporate body, and to assume to itself the power of suing, and of purchas-

(a) 1 Camp. 549, n.

(b) 9 East, 516.

ing and alienating shares; and in *Comyns's Digest* it is said (a), that "a corporation is a franchise created by the King;" and again (b), "that a corporation may be created by the common law, as the King, and that he alone has authority to make a corporation by his charter;" and Lord *Coke's Reports* (c), are referred to in support of that position.

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Mr. Serjeant *Wilde*, in reply. The transfer of the patent was not the sole or principal object of the transaction, but the transfer of the business, which could not be assigned, without communicating to the transferees a knowledge of the process by which the business was carried on; and it was the manifest intention of the parties to dispose of the premises where the distillery was situate, and to find or procure purchasers for it, as well as for the business itself. Not only the premises and the good-will were to be assigned, but the exclusive right to the use of the invention, which would of itself be highly valuable to the shareholders. But the main, if not the only question, is, whether the *seventh* plea discloses sufficient matter in law, to bar the plaintiff's right of action. It merely alleges that the company was *intended* to consist of more than five persons, and to act as a corporate body without any charter; but it does not negative an intent to apply for a charter, or for an act of Parliament. Both these are matters of favour and indulgence, and each should have been negatived; for, if a party impute to another as an offence, that which might be legalized, he must negative every possible means of rendering the act legal; and here the defendant attempts to set up a collateral agreement, to avoid a bond which has nothing illegal upon the face of it. In the formation of roads or canals, they may be marked out and the work begun, although a statute may not have passed;—it is sufficient, if the parties had it in contemplation. In the cases of *Buck v. Buck*, *The King v. Stratton*, and *Josephs*

(a) Tit. *Franchises*, F. 1. (b) Ibid. F. 2. (c) 10 Rep. 29 b.—33 b.

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v. *Pebrer*, the parties were acting unlawfully at the time; but the merely transferring shares in a business, which is not prejudicial or inconvenient to the public, is not illegal, neither is the raising a capital by subscriptions for the purpose of carrying on such trade; for, as was said by Lord *Ellenborough*, in the case of *The King v. Webb* (a): “ We think it impossible to say that the statute 6 *Geo.* 1 makes it a *substantive* offence, to raise a large capital by small subscriptions, without any regard to the nature and quality of the objects for which the capital is raised, or whatever might be the purposes to which it was to be applied.” As to what is stated to have fallen from Lord *Eldon*, in *Kinder v. Taylor*, it must be considered as extra-judicial; and Lord *Ellenborough* said (in continuation), in *The King v. Webb*: “ The recital in the act, as far as it refers to subscriptions, is this: that the persons who contrive such dangerous and *mischievous undertakings* or projects (*id est*, such as manifestly tend to the common grievance, &c.) under false pretence of public good, do presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe, &c. The subscriptions, therefore, which the preamble contemplated, were subscriptions upon *dangerous and mischievous* projects, where the pretences of public good were false, and where the unwary were the persons who were drawn in to subscribe. The enacting part, in section 18, where it refers to subscriptions, makes illegal all public subscriptions, &c., for furthering, countenancing, or proceeding in any *such* undertaking or attempt; that is, such undertakings or attempts as are specially pointed out in the preamble, or any other public undertaking or attempt tending to the common grievance, &c. The enacting part in section 19, relates to all such unlawful undertakings and attempts, so *tending* to the common grievance, &c., and the making or taking of any subscriptions *for that purpose*, &c. It is

(a) 14 East, 420.

only, therefore, where the subscription is with reference to undertakings, &c., which the act prohibits, that it is illegal: the act does not apply indiscriminately to all subscriptions." As, therefore, the plaintiff in this case was to be no party to the actually carrying on the concern, but was merely to bring persons together for the purpose of appointing directors and trustees, and to procure purchasers for the shares; and as it does not appear that he was aware of the proviso in the patent, which rendered it void if it were assigned to any number of persons exceeding *five*, he is entitled to recover on the bond; and the pleas, taken either singly or collectively, are no answer to the action, as they do not negative an intention on his part to apply for a charter or an act of Parliament.

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Lord Chief Justice BEST, on this day, after reading the declaration, the condition of the bond as set out on *oyer*, the terms of the patent as set out in the fifth plea, and the whole of the seventh plea, delivered the judgment of the Court as follows:—

It appears from the condition of the bond, that the plaintiff was not to be entitled to any part of the 10,000*l.* which the obligors had bound themselves to pay him, until he had formed a company, and procured purchasers for nine thousand shares, and payment of the first instalments or calls on those shares. The forming the company, the selling nine thousand shares of what was to be called the stock of such company, and the prevailing on the purchasers to pay one third of their subscriptions, or 150,000*l.*, is a condition precedent to the plaintiff's right of action. The proviso contained in the patent shews that the plaintiff cannot perform this condition without committing a fraud on a vast number of persons; and that, if he could obtain any subscriptions, the subscribers would be entitled to recover back the money paid on them, as being obtained by fraud, or as money paid without con-

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sideration. The moment the company was formed, and the patents were transferred to them, they would cease to exist as legal patents, for they would be destroyed by an assignment to more than *five* persons, or to any persons in trust for more than *five* persons. The condition of the bond shews that the patents were to be assigned to a company formed by subscription; the shares in which were to be transferable. Any one of these circumstances would render the patents void. This difficulty was felt by the counsel for the plaintiff, and he attempted to extricate his client from it, by insisting that it was not intended to convey the exclusive right of distilling spirits from potatoes, secured by the patent, but only to free the intended company from being liable to the patentee for using his invention. But it is clear, from the terms of the bond, that the object of the parties was not to destroy the patents, but that they professed to assign the privilege granted to them to the company which the plaintiff was to form. The words in the recital of the condition of the bond are: “ The said *Jean Jacques Saint Marc, Stamp Brooksbank, and William Dorset Fellowes* (the defendant), have it in contemplation to dispose of their shares and interest, of, in, and to, the said several patents, and of, in, and to, the distillery, premises, plant, and stock in trade in and upon the same, and to part with the same to a company, to be formed, &c.” These terms indicate an intention, not to destroy, but to transfer unimpaired, the monopoly secured by the patents. It has been said, that it does not appear from the pleadings that the plaintiff knew of this proviso in the patents, and that the insertion of such a proviso in patents is not required by any law. But we must presume that he knew the contents of the patents referred to by the bond on which he brings his action—of the patents, of which it appears by the same bond he undertakes the sale in the manner stated in that bond. Every man who undertakes to do a thing, must be presumed to know what he undertakes,

unless he can shew that he has been deceived by the other party. How could the plaintiff undertake to negotiate for the sale of the patents, unless he had seen them, and knew their contents? If he knew the terms on which the patents were granted, he must have known that what he undertook to do could not be done. As he cannot legally perform his part of the contract, he never can be in a condition to recover the compensation stipulated to be paid on its full and complete performance. There are some old authorities which say, that, if a man binds himself by the condition of his bond, to do what, at the time he executed the bond, it was impossible for him to do, the bond shall be considered as without condition, and the obligee may recover the penalty. These authorities are rather opposed to the plaintiff's claim; but they apply only to cases where there is nothing to be done by the obligee. Here, the plaintiff must do something before the bond can be enforced. If what he is to do, can never be legally done, the instrument must be inoperative; the plaintiff, not having performed the first condition, can never have a right of action upon it. The situation of the plaintiff in this case is like that of the defendant in the cases alluded to. It is his fault that he has undertaken what he cannot perform. In the case of *Pullerton v. Agnew* (a), Lord Chief Justice *Holt* said: "Where a condition is under-written, or indorsed, there, that is only void, and the obligation is single; but, where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible, the obligation is void." In the case before us, the service of the plaintiff, and the payment for it by the defendant, are incorporated together; and, if the service cannot be performed, the whole instrument is a nullity. But it is apparent, from the facts disclosed by the condition of this bond, and from the patents, that the scheme in which the

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(a) 1 Salk. 172.

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parties to this action were engaged, was one of those bubbles, by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited, that has been most injurious to commerce and to the morals of the people; of which any one must discover from reading these instruments, that the parties to them must be fully informed. It cannot be too well known that there is no place for persons engaged in such transactions, in Courts appointed for the decision of civil cases. Although the statute 6 *Geo.* 1, c. 18 is in part repealed, the common law relating to such schemes is expressly reserved by the repealing statute (a); and no one doubts, that, if it can be shewn, as it easily may, that such schemes are mere traps, and injurious to the public welfare, the forming of them is an indictable offence at common law.

The *seventh* plea states, and the demurrer admits, that the plaintiff and defendant intended that the company which the plaintiff undertook to form, should act as a corporate body without any charter from the king; that the benefit of the letters patent was to be enjoyed by this pretended corporate body; and that the capital of this body was to be divided into *ten thousand* shares, which were to be *transferable* and *assignable*. It has been said at the bar, that the parties might have intended to obtain an act of Parliament, in order to give this body a legal existence: but nothing of this intention appears on the record. It has been further said, that the defendant should have shewn how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a cor-

(a) 6 *Geo.* 4, c. 91.

poration, the plaintiff should have traversed the plea. By demurring generally, he has confessed himself guilty of intending to form a company that was to act as a corporation. But the shares were to be transferable. There can be no transferable shares of any stock, except the stock of corporations, or of joint-stock companies created by act of Parliament. When it is said that the shares were to be transferable, that must mean that the assignee was to be placed in the precise situation that the assignor stood in before the assignment; that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now, the assignee can join in no action for a cause of action that accrued before the assignment; such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will yet remain liable for every debt contracted by the company before he ceased to be a member. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of Parliament. Such authority is expressly given by the *Bank* acts, the *South-Sea* acts, and the other statutes creating companies that possessed stock which it was deemed proper to render transferable. The pretending to be possessed of transferable stock, is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company, that it should act as a corporation. It is not necessary, on these pleadings, to decide whether the forming a company with such shares, is, of itself, without other circumstances, pretending to act as a corporation; because it is, by the pleadings, distinctly admitted that the plaintiff and defendant intended that the company should act as a corporation. Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King, by

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usurping on his prerogative. By the statute 9 *Anne*, c. 20, the Court may not only give judgment of *ouster*, but may fine a defendant convicted on a *Quo Warranto*. This shews that the usurpation is considered as a criminal act. But it has been insisted, that the usurpation is only criminal, where a party, without authority, acts in a public office; and that the pretended corporation which these parties were to set up, did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relative to the writ of *quo warranto*, from the statute of *Gloucester* down to the 9th *Anne*, inclusive, have the words "offices and franchises." Franchises are privileges for the advantage of individuals. In *Comyns's Digest* (a), many things are mentioned as matters for which a *Quo Warranto* will lie, which are valuable only to the individuals who claim them against the Crown, and are not connected with any public duty. But it concerns the public that bodies composed of a great number of persons, with large disposable capitals, ~~should~~ not be formed without the authority of the Crown, and subject to such regulations as the King in his wisdom may deem necessary for the public security. The acting as such a corporation, without charter from the Crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee, on the formation of any such pretended corporation.

For these reasons, there must be—

Judgment for the defendant.

(a) Tit. "*Quo Warranto*," C. 5.

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CHURCHILL and Another, Assignees of CADOGAN, a Bankrupt, v. CREASE.

Wednesday,
Nov. 26th.

THIS was an action of *assumpsit*, and brought by the plaintiffs, as assignees of *John Cadogan*, a bankrupt, against the defendant, for money had and received by him to the use of the plaintiffs as assignees. The declaration contained the usual money counts. The plaintiffs, by the particulars of their demand, stated that they sought to recover 19*l.* 10*s.* illegally paid to the defendant, on the 8th *June*, 1825, by *Cadogan*, after he had committed an act of bankruptcy. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that the defendant was a paper-hanger; that, on the 4th *April*, 1825, the bankrupt called at his house, and desired him to give him an estimate for papering three rooms in *Adam Street, Adelphi*, which had been damaged by fire, and which were to be repaired by the *Hope* Insurance office, the house in which the fire happened having been insured there; that the defendant made the estimate accordingly, which was approved of by the bankrupt, who desired the defendant to proceed with the work immediately, which he did, and also agreed to deduct twenty-five *per cent.* for prompt payment, on the completion of the work; and a memorandum to that effect was written on the estimate. It also appeared, that, on the 19th *April*, *Cadogan* was committed to the *Fleet Prison*, under a writ sued out against him, by a creditor of the name of *Cooper*; that on the 11th *May*, a meeting of *Cadogan's* creditors was called, but of which the defendant had no notice; that,

A trader in the *Fleet Prison*, under an arrest for debt, eight days before the suing out of a commission of bankrupt against him, obtained a day rule, and went to an insurance office to receive a sum of money that was due to him. The defendant to whom the bankrupt was indebted, knowing that he was about to receive the money, without any communication from him, met him at the office, and procured payment of his debt out of the money received by the bankrupt. The payment was made on the 8th *June*, the debtor having been committed to prison the 19th *April* preceding; and on the 18th *June*, a commission issued against him, on an act of bankruptcy committed by his lying in prison. In *assumpsit* by the assign-

ees, for money had and received by the defendant to their use, the Jury having found that there was no fraudulent preference, and that the defendant did not know of his debtor's insolvency and imprisonment at the time of the payment:—*Held*, that the payment was protected, under the 82nd section of the statute 6 *Geo.* 4, c. 16, and was not a fraudulent preference within the exception in that clause.

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after the completion of the work, *viz.* on the 8th *June*, *Cadogan* obtained a day rule, and went to the *Hope* Insurance office, to receive the amount of his bill for repairing the house in which the fire happened, and in which the defendant's demand for papering the rooms was included. The defendant having ascertained that *Cadogan* would be at the office on that day to receive his money, met him there, without having made any previous appointment with him; who being paid by the secretary, the defendant demanded the amount of his bill, and *Cadogan*, after making various excuses, and offering him payment of part, which the defendant refused to take, at last paid him the full amount, for which the defendant gave a receipt as for work done; that, on the 18th *June*, a commission of bankrupt was issued against *Cadogan*, founded on an act of bankruptcy by his lying in prison; and that, on the 14th *July* following, he was discharged.

The plaintiffs offered no evidence to shew that the defendant knew of *Cadogan's* imprisonment or insolvency, at the time the payment in question was made. But it was contended for them, that the payment was a fraudulent preference by *Cadogan*, and not protected by the 82nd section of the stat. 6 *Geo.* 4, as, by the 136th section of that statute, it was enacted, "that the act should not take effect before the 1st *September*, 1825," which was long subsequent to the payment and the date of the commission; and that, as the money was received by the defendant after an act of bankruptcy by *Cadogan*, and within two months next before the issuing of the commission; the plaintiffs, as his assignees, had a right to recover it back, as money had and received to their use.

For the defendant, it was insisted, that, as the payment was made in the ordinary course of business, and without notice to the defendant of the imprisonment or insolvency of *Cadogan*, such payment was protected by the statute 19 *Geo.* 2, c. 32, s. 1, or by the 6 *Geo.* 4, c. 16, s. 82, as,

although the commission was dated on the 18th *June*, 1825, yet that section enacts that all payments really and *bond fide* made, or which thereafter should be made, by any bankrupt, before the date and issuing of a commission against him (such payment not being a fraudulent preference of the creditor), should be deemed valid, notwithstanding a prior act of bankruptcy. And although the 136th section declares that the act should not take effect until the 1st *September* following, yet the moment it had passed, a payment, although made after the date of the act (*vis.* the 2d of *May*), was protected, as well as payments made before that day.

His Lordship intimated a strong opinion that the payment was protected by the 82d section of the late act; but left it to the Jury to say whether *Cadogan* had made the payment to the defendant, with a view to a fraudulent preference, or *bond fide*; the debt due from *Cadogan* to the defendant being for ready money on the completion of the work.

The Jury found that there was no fraudulent preference, and also that the defendant did not know of *Cadogan's* insolvency or imprisonment at the time the payment was made, and they accordingly gave a verdict for the defendant; leave being reserved the plaintiffs to move to set it aside, and that a new trial might be granted, in case the Court should be of opinion that the payment was not protected under the 6 *Geo.* 4, c. 16.

Mr. Serjeant *Wilde*, on a former day in this Term, accordingly obtained a rule *nisi*, and relied on the objections taken for the plaintiffs at the trial, and submitted that, from the whole of the evidence, the Jury were not warranted in finding that the payment was not made with a view to a fraudulent preference. That, at all events, it was a *voluntary* payment, as it was not made under an apprehension of civil process, or the importunity of the defendant, as the bank-

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rupt was in prison at the time. Besides, the payment cannot be protected by the 82d section of the 6th Geo. 4, as the case of the *fraudulent preference of a creditor* is thereby expressly excepted; neither can that statute have a retrospective operation, as it was not to take effect until nearly three months after the payment and the date of the commission.

Mr. Serjeant *Taddy*, was now about to shew cause, when the Court called on—

Mr. Serjeant *Wilde*, to support his rule.—Even if the payment in question were made *bond fide*, it was not protected by the 46th Geo. 3, c. 135, s. 1, or the 49th Geo. 3, c. 121, s. 1, as it was made after an act of bankruptcy, and only ten days before the issuing of the commission; and by those statutes, conveyances and payments by and to, and contracts by and with, any bankrupt, *bond fide* made more than *two months* before the date of the commission, are alone protected. Nor does this payment fall within the statute 19 Geo. 2, c. 32, as it was made after an act of bankruptcy, and not for goods sold, or bills of exchange drawn and negotiated, in the ordinary course of trade. The debtor was, in fact, in prison at the time of the payment, and his lying there had relation back to the first day of his surrender, and operates as if it were a complete act of bankruptcy, and he was not in a condition to dread an arrest by the defendant, nor was the payment made under pressure or importunity by the creditor; and if there be no power of compulsion, it must be inferred that the payment was *voluntary*, and there is nothing to rebut such an inference. The 82d section of the statute 6 Geo. 4, c. 16, cannot avail the defendant, as it only applies to payments really and *bond fide* made by a bankrupt to a creditor, before the date of the commission (such payment not being a fraudulent preference of such creditor). The bankrupt must have been

aware of his insolvency at the time, and he had previously contemplated a general arrangement with his creditors; and although the defendant did not attend at the meeting, yet as the payment was made only ten days before the issuing of the commission, the debtor not then being under the influence of his creditor, it must be assumed to be voluntary, and made with a view to a fraudulent preference, particularly as the debtor would not have been placed in a worse situation, in case he had refused payment. The demand was not made under a threat, or even dread of legal process; and it was, at all events, incumbent on the defendant to shew that he had pressed the bankrupt for payment so as to place himself in the situation of an importunate creditor. Although a demand for a further security for a debt not due is held not to vitiate a transaction of this nature, on the ground of fraudulent preference, according to the case of *Hartshorn v. Slodden* (a), or of *Crosby v. Crouch* (b), where a trader had procured A. to discount bills, who afterwards required him to deposit goods as a collateral security; Lord *Ellenborough* observed (c), that "The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been, that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, spontaneously favoured one of his creditors to the prejudice of the rest." But the principle established in *Thornton v. Hargreaves* (d), is expressly applicable to this case. There, a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home and became a bankrupt; and the Court held, that, inasmuch as

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(a) 2 Bos. & Pul. 582.

(b) 2 Camp. 165; S. C. 11 East, 256.

(c) 1 Camp. 168.

(d) 7 East, 544.

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the act done *did not redeem the trader even from any present difficulty, which was the ordinary motive for such an act when really done under the pressure of a threat*, it was evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy; and was therefore void as against the assignees of the bankrupt. But, *secondly*, the 82d section of the statute 6 Geo. 4, cannot apply, because, with the exception of bankrupts' certificates, and the repeal of the statute 5 Geo. 4, that act did not come into operation until the 1st *September*, 1825; and the Court so held in the late case of *Maggs v. Hunt (a)*, where a commission having been sued out against a trader on the 8th *September*, 1825, upon an act of bankruptcy committed by him on the 8th *July* preceding, it was held, that it could not be supported: and although the 135th section excepts certain preceding specific enactments, yet the Legislature meant that no one clause of the act should take effect until the 1st *September*, 1825. Even if the payment were not a voluntary payment, it amounted at all events to a fraudulent preference; but it must be taken to be voluntary, as it was neither made under an apprehension of legal process, nor even through the importunity of the creditor.

Lord Chief Justice BEST.—The first point to be considered in this case, is, whether the payment in question falls within the provisions of the statute 6 Geo. 4, c. 16. I am clearly of opinion that it does. It is true, that, by the 136th section, the period as to which the general operation of the act was to take effect is postponed till the 1st *September*, 1825, which was subsequent to the payment in question, and also to the issuing of the commission; and I should have thought that section conclusive,

(a) 4 Bing. 212.

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if there were no particular clause from which a different intention might be collected. But it is a general rule, in the construction of statutes, that, where a general intention is expressed, and also a particular intent, inconsistent with the general intention, the particular intent forms and is to be considered in the nature of an exception. The main question then is, whether the 82nd section of the statute 6 Geo. 4, by which the statutes 1 Jac. 1, c. 15, s. 14,—19 Geo. 2, c. 32, s. 1,—and 46 Geo. 3, c. 135, s. 1, were extended and altered, forms such an exception; if it does, the payment in question is protected by it. That section enacts, “that *all payments really and bond fide made, or which shall hereafter be made* by any bankrupt, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed.” Unless the expression, *payments made*, does not refer to payments at the time of the passing of the act, the words, “or which *hereafter shall be made*,” would be altogether nugatory. It seems to me, therefore, to be absurd to say, that the Legislature did not contemplate all payments really and *bond fide* made at the time of the passing of the act, or that such payments only were to be protected which were to be made after it came fully into operation. The next question is, whether the payment in question was a fraudulent preference by the bankrupt. It has been contended, that, even if it were not a voluntary payment, it would, under the circumstances, amount to a fraudulent preference by the bankrupt as against his other creditors. But that is not so. The words of the statute are (a), “make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels.” And, in order to bring a payment within those terms, it must be made with a view to a

(a) See section 3.

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fraudulent preference. We are not to presume fraud. It must in all cases be proved and found as a fact by a Jury; and here, they have expressly negatived that the defendant knew of the imprisonment or insolvency of his debtor at the time the payment in question was made. But it is said that they should have found otherwise, as the payment was made whilst the debtor was confined in prison, and only a few days before the commission was sued out against him; and, therefore, that he would not have been placed in a worse situation if he had refused payment. But that is not true, for he might have been able to have come to terms with all his other creditors, or might have been discharged out of custody at the suit of the particular creditor at whose instance he was confined. But he was still liable to have a detainer lodged against him by the defendant; and an inference may be fairly drawn that that consideration induced him to yield to his demand. At all events, it was sufficient to repel the presumption of a fraudulent preference, which question was fully left to the Jury. The case of *Thornton v. Hargreaves*, and others of that class, do not appear to me to be at all applicable to the present. There, the trader gave a bill of sale of apparently the whole of his stock, or all he had in the world; and it was held, that, inasmuch as it did not redeem him even from any present difficulty, neither could he derive any benefit from it, and the assignment was not made under a pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy, it was void against the assignees. And Lord *Ellenborough* there said (a): "The only difficulty which lies on the plaintiffs in this case, is to make out that this was a *voluntary* payment on the part of the bankrupt; for, that bankruptcy was contemplated by him when he made the bill of sale, all the evidence strongly shews. But, taking the conversation reported between the de-

(a) 7 East, 548.

fendants and the bankrupt to be a threat of process if they did not receive payment or security for their demand, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business and leave his home." And Mr. Justice *Lawrence* expressed his opinion in still stronger terms, and said: "If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy; and, if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditors." That, however, cannot be compared to the payment of so small a sum as 19*l.*, for a debt fairly contracted, and which the defendant was to have received immediately on the completion of the work; and, as the Jury have expressly found that the defendant did not know of the imprisonment or insolvency of his debtor at the time of the payment in question, and also that it was made without fraud, their verdict is conclusive, and this rule must consequently be discharged.

Mr. Justice PARK.—All cases of this description must depend upon their own peculiar circumstances, and it is a mere question of fact for a Jury to say whether fraud has been committed or not; and here, that question was fairly and fully left to them, and I am clearly of opinion that they have come to a right conclusion; and, as the verdict was for a less sum than 20*l.*, the rule ought not to have been granted. With respect to the question which has been raised as to the construction to be put on the statute 6 *Geo.* 4, c. 16, although the 136th section enacts that the act shall not take effect before the 1st *September*, 1825, except as to bankrupt's certificates and the repeal of the 5th *Geo.* 4; yet the 135th section enacts, that the

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act shall be construed beneficially for creditors, and that nothing therein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared; and the words in the 82nd section "that all payments *made*, or which *hereafter shall be made*," are extremely strong, if not conclusive, to shew that the Legislature intended to protect all payments actually made at the time of the passing of the act, on the 2nd *May*, and even those made before that day; and here, the payment was made more than a month after the statute was passed. All payments *made* must be considered to refer to payments *theretofore made*, and more particularly so, as they were followed by the words, "or which *hereafter* shall be made." Again, the words are, "all payments really and *bona fide* made by a bankrupt to a creditor (such payment not being a fraudulent preference) shall be deemed valid, notwithstanding any prior act of bankruptcy." And here, there was no evidence to shew that the defendant knew of his debtor's imprisonment or insolvency, or that he had committed an inchoate act of bankruptcy. The payment, therefore, was valid, unless it were made with a view to a fraudulent preference. What then are the facts? The defendant, a paper-hanger, had done work for the bankrupt, and he knew that the latter was about to receive money at a fire-office, on a particular day; he accordingly went there, and, seeing his debtor receive the money he asked for the sum due to him, and, as the demand was made in ignorance of the insolvency of his debtor, or that he had gone to the fire-office on a day rule, it did not destroy the *bona fides* of the transaction, nor did the payment sweep away the whole of the property of the debtor as in *Thornton v. Hargreaves*. So, in *Hartshorn v. Slodden* (a), where the trader, at the instance of a creditor, gave goods out of his shop in part payment of a bond not then due, even that circumstance was held not to

(a) 2 Bos. & Pul. 582.

vitate the transaction; and Lord Chief Justice *Alvanley* said (a): "If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." And here, the defendant made a demand for a sum long before due to him, and the Jury have expressly negatived fraud or collusion.

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Mr. Justice BURROUGH.—When this application was made I thought the rule ought not to have been granted. The late statute provides, that it is to be construed beneficially to creditors; and here, the Jury have found not only that the bankrupt had not made this payment by way of fraudulent preference, but also that the defendant did not know of the insolvency or imprisonment of his debtor at the time. The defendant only claimed a small sum to which he was justly entitled, and he received it out of a larger amount which the bankrupt had just before been paid by the fire-office. There was no ground even to suspect a collusion between them, and the bankrupt did not part with the whole of his property, so as to bring this case within that of *Thornton v. Hargreaves*.

Mr. Justice GASELEE.—I am also of opinion that there is no ground for the Court to interfere, as the question of fraud was most properly left to the Jury, and it was a point entirely for their consideration. For any thing that appears to the contrary, the defendant might have made frequent demands of his debt previously to his meeting the bankrupt at the fire-office; and when he found that his debtor was about to receive money there on a particular day, it was natural for him to go and meet him; and there was no evidence to shew that he went there upon any previous intimation from the bankrupt.

Rule discharged.

(a) 2 Bos. & Pul. 585.

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The defendant having paid money into Court as a security for the debt and costs, in pursuance of the statute 7 & 8 Geo. 4, c. 71, s. 2, and obtained a verdict, on which judgment was entered up:—

Held, that the rule to have the money repaid to him is only a rule *nisi* in the first instance;

and that, in order to make it absolute, it is necessary to produce the record, and certificates from the clerk of the judgments and the Prothonotary, that judgment had been duly signed, and the money paid into Court.

SYMES v. ROSE.

THE plaintiff having arrested the defendant for 120*l.* under a writ of *capias* issued out of this Court, he deposited that sum with the sheriff, together with the further sum of 10*l.* as a security for costs, to abide the event of the suit, which sums the sheriff afterwards paid into Court, and the defendant, instead of perfecting special bail, paid in the additional sum of 10*l.* as a further security for the costs of the action, to remain in Court to abide the event of the suit, according to the provisions of the statute 7 & 8 Geo. 4, c. 71, s. 2 (a).

The cause having come on for trial before Lord Chief

(a) Which—after reciting, that, by an act passed in the 43rd year of the reign of his late Majesty, (43 Geo. 3, c. 46, s. 2,) persons arrested upon *mesne* process were enabled, in lieu of giving bail to the sheriff, to deposit in his hands the sum indorsed upon the writ, together with *ten* pounds in addition, to answer the costs which might accrue up to the time of the return of the writ, and also such further sum, if any, as should have been paid for the King's fine upon any original writ, and should thereupon be discharged from such arrest; and that it was expedient to extend the provisions of the said act, and to enable persons who have been arrested, to deposit or pay into the Court in which the writ shall be returnable, the sum indorsed upon the writ, together with an additional

sum as a security for costs, to abide the event of the suit, instead of putting in and perfecting bail in the said action—enacts, that, “in all cases in which any defendant shall have been discharged from arrest, upon making such deposit as was required by the said recited act, and the sum so deposited shall have been paid into Court, it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course and practice of the Court, to allow the sum so deposited with the sheriff, and by him paid into Court as aforesaid, together with the additional sum of *ten* pounds, to be paid into Court by such defendant as a further security for the costs of the action, to remain in the Court, to abide the event of the suit.”

Justice *Best*, at *Westminster*, at the Sittings after the last Term, the Jury found a verdict for the defendant; and judgment having been entered up thereon—

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Mr. Serjeant *Andrews*, on a former day in this Term, moved, that the monies so deposited and paid into Court might be repaid to the defendant, the *postea* having been delivered to him; and the learned Serjeant submitted, that he was clearly entitled to repayment, as the time had elapsed within which the plaintiff might move for a new trial.

As this was the first application under the statute, the Secondary doubted whether the rule should be absolute in the first instance, or only a rule to shew cause.

[* “ And, in all cases where any defendant shall have been arrested and given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last-mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said Court the sum indorsed on the writ, together with the amount of the King’s fine, if any, upon the original writ, and the further sum of *twenty* pounds as a security for the costs of the action, there to remain, to abide the event of the suit;] and thereupon the said defendant may, and he is thereby required, to enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the said Court; or in default thereof, the plaintiff in the action is thereby empowered to enter such common appearance, or file common

bail for the said defendant; and the cause may proceed, as if the defendant had put in and perfected special bail.—And in case judgment in the said action shall be given for the plaintiff, he shall be entitled, by order of the Court, upon motion made for that purpose, to receive the said money so remaining in or so deposited or paid into Court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application; and if judgment be given in the said action for the defendant, or the plaintiff discontinue his suit, or be otherwise barred; or in case the sum deposited and paid into the Court be more than sufficient to satisfy the plaintiff, the said money so deposited or paid into Court, or so much thereof as shall remain, shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant.”

* See next case.

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But the Court, considering that the plaintiff might bring a writ of error, said that there ought only to be a rule *nisi*; and that, before it was made absolute, it was necessary to produce the record, as well as a certificate of the clerk of the judgments stating that judgment had been duly signed, and also a certificate from the Prothonotary that the above sums had been paid into Court.

Mr. Serjeant *Andrews*, on this day produced the record, and the certificates as required above, and an affidavit stating that a copy of the rule *nisi* had been served on the plaintiff, on which the Court ordered it to be made—

Absolute.

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SMITH v. JORDAN.

The defendant, having been arrested, paid into Court the sum indorsed on the writ, and the further sum of twenty pounds as a security for costs, to abide the event of the suit, in pursuance of the statute 7 & 8 Geo. 4, c. 71, instead of putting in and perfecting special bail:—

Held, that he was entitled to have the bail-bond delivered up to him to be cancelled.

A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, calling on the plaintiff to shew cause, why the bail-bond which had been entered into and given by the defendant in this cause, might not be delivered up to be cancelled, on an affidavit which stated that, since the bond was executed, he had paid into the hands of one of the Prothonotaries of this Court, the sum of 28*l.*, being the amount indorsed upon the writ, and the further sum of 20*l.* as a security for the costs of the action, in pursuance of the statute 7 & 8 Geo. 4, c. 71, s. 2 *.

Mr. Serjeant *Merewether* now shewed cause, and submitted, that, although the defendant might pay the debt into Court, with 20*l.* to answer the costs, instead of putting in and perfecting special bail, still that, having given a bail-bond, there was no ground for ordering it to be cancelled, as it ought to remain as an additional security, in case the costs of the action should eventually exceed 20*l.*

But the Court held, that, as the statute enacted that, if

* See *ante*, p. 427.

the defendant gave bail to the sheriff, he might pay the debt into Court, with 20*l.* to answer costs, on which he was entitled to file common bail, he was at liberty to have the bail-bond delivered up to him, as it fell within the terms, as well as the meaning of the act.

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Rule absolute.

CARRUTHERS v. PAYNE, and two Others.

Thursday,
Nov. 27*th*.

THIS was an action of trover for a chariot, with the furniture and fittings belonging thereto. At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that the defendants were the assignees of one *M'Neill*, the elder, a bankrupt: but the action was not brought against them as such. On the bankrupt's son being called as a witness, he stated, that his father was a coach-maker, and that, in *September*, 1826, the plaintiff agreed to purchase a new chariot for two hundred and forty guineas, which was to be finished by the latter end of *October*, according to certain terms, as specified in a written agreement; that the chariot was built accordingly, and that, on the 30*th March*, 1827, its amount was paid for by the plaintiff; that he afterwards directed a front seat to be added; but the builder having neglected to do so, the plaintiff sent for the chariot repeatedly, and the former promised to deliver it; that the plaintiff afterwards wrote to the builder, saying, that, as the

The 44*th* section of the statute 6 *Geo.* 4, c. 16, which enacts, that "*every action brought against any person for any thing done in pursuance of the act, shall be commenced within three calendar months next after the fact committed,*" does not apply to actions against assignees, who only act in the disposition and distribution of the property of the bankrupt, and not under any power conferred on them by law, or for any special purpose under the act; for *the act done ap-*

plies to acts done for the purpose of taking possession of the bankrupt's property by the commissioners, or messengers acting under their warrant. Therefore, trover for a chariot seized by assignees on the premises of the bankrupt, was held to be maintainable, although the action was not commenced by the owner, against the assignees, within three months after the seizure.

The plaintiff ordered a chariot to be built, which was to be finished according to certain directions, and for which he paid; and after it had been finished in other respects, he ordered a front seat to be added, but the builder not executing the order, the plaintiff sent for the chariot several times, and the builder promised to deliver it. Subsequently, the plaintiff said he did not want the chariot, and ordered it to be sold, and it was standing in the builder's warehouse for that purpose, the front seat not having been added; when a commission of bankrupt was issued against the builder, and his assignees seized and sold the carriage under the commission:—*Held*, that the plaintiff had a sufficient property in the chariot to maintain trover, and that it did not pass to the assignees as being in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner, within the 72*nd* section of the statute.

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chariot was not required by him, as he should prefer an open carriage, he wished the builder to dispose of it at what it cost; and that, if it could not be disposed of without a loss, he must keep it; that the chariot was accordingly left in a shed immediately behind the builder's shop, for the purpose of sale; and it was proved, that it was usual for coach-makers, and according to the custom of the trade, to have carriages belonging to different gentlemen standing on their premises exposed for sale, as well as for the purpose of being repaired. It was also proved that *M'Neill*, the builder of the carriage, became bankrupt on the 3rd *May*; that a commission was sued out against him on the 8th; and that the chariot was seised by the defendants, as his assignees, and sold by auction under their direction on the 28th *June* following, the front seat not having been added, although it was complete as a travelling chariot at first. It also appeared that the writ in this action was not sued out until the 21st *April*, 1828. When it was objected for the defendants, *first*, that trover could not be maintained for an article not finished and delivered; *secondly*, that the chariot was in the possession, order, or disposition of the bankrupt, at the time of his bankruptcy, within the meaning of the 72nd section of the statute 6 *Geo.* 4, c. 16 (*a*); and therefore that the defendants were entitled to it, as his assignees: and, *thirdly*, that, as the action was not brought within three months after the sale and conversion of the carriage, the defendants were protected by the 44th section of that statute (*b*), and consequently entitled to a verdict.

(*a*) By which it is enacted, "that, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the

sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

(*b*) By which it is enacted, "that every action brought against any person for any thing done in pursuance of this act, shall be com-

His Lordship was strongly inclined to think that there was no weight in either of the objections; but, as he considered the last to embrace a material question, he reserved the whole for the consideration of the Court. A verdict was accordingly taken for the plaintiff, for the value of the chariot, leave being reserved to the defendants to enter a nonsuit, or that a verdict might be entered for them, in case the Court should be of opinion that either of the above objections was well founded.

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Mr. Serjeant *Taddy*, on a former day in this Term, obtained a rule *nisi* accordingly; and, in support of the first objection, he relied on the case of *Mucklow v. Mangles (a)*, where it was held, that, if a person contract with another for a chattel which is not in existence at the time of the contract, though he pay him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel, till it is finished and delivered to him; and therefore that trover cannot be maintained for it. That was an action of trover, by the assignees of a bankrupt, for a barge, which the bankrupt, a barge-builder, had undertaken to build for one *Pocock*, who, before the work was begun, advanced the bankrupt money on account, and, as it proceeded, paid him the whole

menced within three calendar months next after *the fact committed*; and the defendant or defendants in any such case may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and, if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the Jury shall find for

the defendant or defendants; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit, after appearance thereto, or, if upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

(a) 1 Taunt. 318.

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value, and when the barge was nearly finished, *Pocock's* name was painted on the stern; and two days after the completion of the work, and before a commission of bankrupt had issued against the barge-builder, the Sheriff of *Middlesex* took the barge under an execution against him, it not having then been delivered up to *Pocock*. And Sir *James Mansfield*, said: "The only effect of the payment is, that the bankrupt was under a contract to finish the barge; that is quite a different thing from a contract of sale, and until the barge was finished, we cannot say that it was so far *Pocock's* property that he could have taken it away." And on that case being cited in *Woods v. Russell* (a), its authority was not questioned; but the Court drew a distinction between the two cases. *Secondly*, as the chariot was on the bankrupt's premises, where the plaintiff had allowed it to remain for sale, and it was there when the defendants took possession, and had never been removed from the bankrupt's premises since it was built, nor distinguishable from his stock, it must be taken to be in the possession, or at all events, in his order or disposition, with the consent and permission of the true owner, within the 72nd section of the statute; and more particularly so, as it was proved that it stood on the plaintiff's account on the bankrupt's premises, in the ordinary way in which gentlemen's carriages are permitted to remain at coach-makers, when sent to be repaired or cleaned. In *Thackthwaite v. Cock* (b), a custom, that purchasers of hops from hop merchants should leave them in the merchant's warehouse, for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, was held not to be such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. That case is scarcely distinguishable

(a) 5 Barn. & Ald. 942.

(b) 3 Taunt. 487.

from the present. In *Knowles v. Horsfall* (a), where a spirit merchant sold to a wine-merchant several casks of brandy, some of which, at the time of the sale, were in the spirit merchant's own vaults, and others in the vaults of a regular warehouse-keeper; and it was agreed between the parties that the brandies should remain where they were, until the vendee could conveniently remove them; and, immediately after the sale, the vendee marked the several casks with his initials, and it was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place, but no notice of it had been given to the warehouse-keeper with whom some of the casks were deposited. The spirit merchant having become bankrupt while the brandies remained where they were originally deposited—it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the statute 21 Jac. 1, c. 19, s. 11; and *Thackthwaite v. Cock* was there referred to, and its authority recognized by the Court.

Thirdly, as the chariot was sold on the 28th June, 1827, and this action was not brought until nearly ten months afterwards, it is quite clear that it was too late; and that, on the defendants' proving themselves to be assignees, they were entitled to a verdict; as the *thing done* within the meaning of the 44th section of the statute 6 Geo. 4, c. 16, was the conversion of the plaintiff's chariot, which was completed by the sale under the commission.

Mr. Serjeant *Wilde* afterwards shewed cause.—With respect to the *first* objection—The maker of the chariot was not under a contract to build or finish it at the time of his bankruptcy, as in *Mucklow v. Mangles*, as it was not only in effect completed as a travelling chariot before pay-

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(a) 5 Barn. & Ald. 134.

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ment by the plaintiff, but was identified as such by the builder, and afterwards remained on his premises in the same manner as if it had been left with him for the purpose of repair; and the merely ordering a front seat to be added can make no difference, the article having been previously finished and paid for. In *Woods v. Russell*, where a ship was to be paid for by instalments, according to the progress of the work, the Court of *King's Bench* thought that the payment of such instalments appropriated specifically to the party for whom it was building the ship so in progress, and vested the property in him; and, as the builder had signed a certificate according to the registry act, to enable the party to have the ship registered in his name, he was holden, by so doing, to have consented that the general property in the ship should be considered from that time as being in the party for whom she was built. And the Court there said (a), "that the bankrupt could not be injured by having the general property in the ship considered as vested in the party who contracted for the building of her, because the former would still have a lien upon the possession for the residue of the price; and that the legal effect of signing the certificate for the purpose of having the ship registered, was, from the time the registry was complete, to vest the general property in the contractor:" and they drew a distinction between that case and *Mucklow v. Mangles*, where the party contracting with the builder paid him the whole value in advance, and the builder becoming bankrupt during the progress of the work, it was properly held that the party contracting acquired no property in the barge till she was finished and delivered to him. The case of *Woods v. Russell* is much stronger than the present; as there the vessel was neither finished nor launched, neither was the full price paid for her. Here, however, the chariot was not only built according to the plaintiff's order, but he paid the full price of it to the build-

(a) 5 Barn. & Ald. 947.

er long before he became bankrupt; and if the chariot had been afterwards destroyed by fire, it is quite clear that the plaintiff must have borne the loss. As to the *second* objection—As it appeared that the plaintiff had frequently sent for the chariot after it was completed according to the terms of the original order, in expectation that the front seat had been added, and the bankrupt had promised to deliver it, it remained in his possession by his own act, and through his own delay, and not with the consent of the plaintiff; whilst in *Thackthwaite v. Cock*, and in *Knowles v. Horsfall*, it was agreed between the parties that the articles purchased should remain in the merchant's warehouse, in the one case, for the purpose of re-sale, and in the other, until they could be conveniently removed; which circumstances distinguish them from the present. With respect to the *third* objection—that the action was not brought within the time limited by the 6 Geo. 4, c. 16—The 44th section of that statute was introduced instead of the 16th section of the statute 1 Jac. 1, c. 15; and the words of it do not extend to mere questions of property vested in the assignees, but apply only to actions brought against commissioners, or other persons acting as public officers in the discharge of a public duty. There is a wide distinction between assignees of a bankrupt, who are appointed for the purpose of investigating disputed claims of creditors, or arranging the pecuniary concerns of the bankrupt, and commissioners, or messengers acting under them, who take the property in the first instance. The commissioners are clothed with an authority of a penal nature, as they have power to commit a bankrupt in certain cases; and the messengers are officers of the Court, and are empowered to seize the property of the bankrupt, under the warrant of the commissioners; and if they are obstructed in the execution of their duty, it is a contempt of the Great Seal, and punishable as such. The terms of the 87th section of the statute, which enacts, that no title to any property sold under the commission

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shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, unless the bankrupt shall have commenced proceedings to supersede the commission, and duly prosecuted the same, within *twelve calendar months* from the issuing thereof, would be altogether nugatory if the 44th sect. be deemed applicable to assignees, as the commencement of the proceedings to supersede the commission, under the 87th section, is, the bringing of an action against the assignees. The 44th section must be taken with reference to the 41st, 42nd, and 43rd, which apply to commissioners only, and were introduced in the late act to afford them the full protection given them by former statutes. The 41st section enacts, that no writ shall be sued out against any commissioner, for any thing done by him as such, unless notice in writing of such intended writ shall have been delivered to him at least one calendar month before the suing out of such writ. The 42nd enacts, that no plaintiff shall recover any verdict against a commissioner, unless such notice be proved at the trial; and that, in default thereof, such commissioner shall recover a verdict, and costs as *thereinafter* mentioned, *vis.* the double costs given by the 44th section of the statute. The 43rd section enables a commissioner to tender amends within one month after receiving the notice required by the 41st section, and, if the same is not accepted, to plead such tender in bar: and although the 44th section enacts, that every action brought against any person for any thing done in pursuance of the act, shall be commenced within three months next after the fact committed; yet that must be taken to apply to the commissioners only, or to the messengers acting under their warrant, as it is enacted, that, if judgment be given against the plaintiff, the defendant shall recover double costs, which are referred to in the 42nd section, and to which he cannot be entitled unless the plaintiff prove the giving the notice as required by that section; and such notice cannot

apply to assignees, who take no beneficial interest in the property of the bankrupt, but only regulate its final distribution; and the mere sale of his effects cannot be considered as a thing done in pursuance of the act. Public officers, and persons connected with government in the collection of the revenue, Justices of the Peace, and others, are protected in the execution of their duty. In *Wallace v. Smith* (a) it was held that the treasurer of the *West India Dock Company* was protected by the statute 39 Geo. 3, c. 69, which directs that no action should be commenced against any person, for any thing done in pursuance or under colour of the act, until fourteen days' notice should be given in writing. But the treasurer of the *West India Dock Company* must be considered in the light of a public officer, and cannot be treated as a person dealing with his own property. He, therefore, cannot be considered as standing in the like situation as assignees of a bankrupt, who have only the ultimate disposition of the property, and, as far as pecuniary arrangements go, stand in the same situation as the bankrupt himself.

Mr. Serjeant *Taddy*, in support of his rule.—*First*, the case of *Mucklow v. Mangles* has established the principle, that, where a chattel is made to order, the property therein is not vested in the *quasi* vendee until it be finished and delivered, notwithstanding he may have paid for it. Here, the plaintiff contracted for a chariot with a front seat, and as it was not added, or the chariot finished as contemplated by him, it was not the article for which he had contracted, and he had, therefore, no right to demand it, nor was the builder bound to deliver it; and it was proved that the seat was not affixed to the carriage at the time it was seized under the commission. Although, in *Woods v. Russell*, the ship was neither finished nor launch-

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(a) 5 East, 115.

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ed, yet the builder had registered her in the name of the defendant; and Lord Chief Justice *Abbott*, in delivering the judgment of the Court, relied mainly upon that fact, and said, that, as the defendant would have to make oath that he was the owner of the ship, the ownership should be considered his. *Secondly*—The 72nd section of the statute 6 Geo. 4, is in lieu of the 11th section of the statute 21 Jac. 1, c. 19. The builder of the chariot must be considered as the true owner, or, at all events, as having it in his possession, order, or disposition, by the consent of the true owner, until it was completed according to the contract; and here, the chariot was never delivered to the purchaser, nor was ever out of the possession of the builder. In *Knowles v. Horsfall*, although the casks were marked with the initials of the vendee, yet those that remained on the premises where they were sold, were held to pass to the assignees of the vendor, who had become bankrupt. So, in *Thackthwaite v. Cock*, a custom of trade was held not to prevail so as to prevent property, remaining in the possession of a bankrupt, from passing to his assignees. *Lastly*—If the 44th section of the late statute was not intended to apply to the case of assignees, it would have been altogether unnecessary to limit the three preceding sections to the commissioners. The words of the 44th section are of the most general description, and cannot be confined to the commissioners or the officers acting under them. It enacts, that *every* action brought against *any person* for *any thing done* in pursuance of the act, shall be commenced within three months next after the fact committed. It is for the benefit of the creditors of a bankrupt that the protection given to the commissioners should be extended to the assignees, as they ought to make as speedy a division of the bankrupt's property as possible. And, although here it may be said that the assignees have exceeded their duty in selling the carriage in question, yet the object of the Legislature was to prevent them, after the expiration of three

months, from being put to an expense by reason of any thing they might have done in that character; for it would otherwise be a great hardship, as it might frequently happen, that, after the whole produce of a bankrupt's estate had been divided, by order of the commissioners, amongst the creditors, actions might be brought, and proceedings taken against assignees, by which they would be put to considerable costs, without having any funds to indemnify themselves. But the 44th section must be construed with analogy to other statutes by which various parties are protected. The statute 39 Geo. 3, c. 69, s. 184 directs, that the *West India Dock Company* shall sue in the name of their *treasurer* in all actions by or on behalf of the company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by, the company; and the 185th section, after extending the protection of the statute 24 Geo. 2, c. 44, for privileging Justices of Peace, in actions brought against them as such, to the Lord Mayor and Aldermen of *London*, acting, under the 39 Geo. 3, beyond the limits of the city, directs, that “no action shall be commenced against *any person or persons, for any thing done in pursuance or under colour of that act, until after fourteen days' notice in writing, or after tender of amends, &c.*” And, in *Wallace v. Smith*, it was held, that the *treasurer* of the company was a person within the clause; that he, being sued for an act done by the *company* which induced an injury to the plaintiffs, was entitled to such notice before action brought; and that such notices were necessary in actions for trespasses or *torts*: and this is an action of the latter description. That case was relied on as an authority, in the late case of *Sellick v. Smith, Keeling, and Drake* (a), where, in an action of trover against the treasurer of the *West India Dock Company*, for refusing to deliver sugars deposited in the

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(a) 2 Carr. & Payne, 584; S. C. T. T. 7 Geo. 4, 11 B. Moore.

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docks, he was held entitled to the protection of the statute 39 *Geo. 3*, c. 69; and that the defendants' having taken a bond of indemnity was not a waiver of such protection; and the Court said, that the one case could not be distinguished in principle from the other. In *Gaby v. The Wilts and Berks Canal Company* (a), where a proviso in an act of Parliament—(35 *Geo. 3*, c. 52, section 144), limiting actions for *any thing done* by any person or persons, in pursuance of the act, or in the execution of the powers and authorities, or the orders and directions, therein granted, within six calendar months next after the fact committed—was held to extend to cases where a party does an act within the limits of his official authority, but exercises that authority improperly, or abuses the discretion placed in him, although under the idea that he was acting within it: and Lord *Ellenborough* there said (b): “It appears to me that the clauses of this act were meant to relate to persons entrusted with and in the fair execution of its powers, though they may have done that which the act does not permit; to this extent, that any question touching those powers should be brought to a speedy decision, and no farther.” So, here, the assignees must be considered as persons entrusted with the execution of the powers of this act; and, if so, they were not liable to be sued after the expiration of three months from the time of the sale of the chariot, which sale was the conversion for which the plaintiff sought to recover in this action, and which was the *fact committed* within the 44th section of the statute. This is clearly the principle to be deduced from the case of *Gaby v. The Wilts Canal Company*. A similar construction has been put upon acts for the protection of magistrates, constables, excise officers, &c., and it must be extended to assignees, who derive authority from the commissioners, and act generally for large bodies

(a) 3 *Mau. & Selw.* 580.

(b) *Id.* 587.

of creditors, amongst whom they are compelled to divide the bankrupt's estate as they receive it.

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Lord Chief Justice BEST.—Three objections have been raised to the verdict which has been found for the plaintiff in this case.—*First*, that trover would not lie, as the chariot was neither finished by the builder, nor delivered to the plaintiff. If it had rested as it was immediately after the bargain, there might perhaps have been some ground for the objection, and the case might have fallen within the principle of *Mucklow v. Mangles*, where Mr. Justice Heath said: “A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. The painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made.” So, here, the chariot was in existence at the time the plaintiff ordered the front seat to be added to it. If a case similar to that of *Mucklow v. Mangles* should again occur, it might deserve some consideration; but this differs from it in this material respect, that, after the chariot was complete as a travelling chariot, the plaintiff dealt with it as if it were his own, and it was treated as finished both by him and the builder. The full price was paid for it, and the plaintiff was not only disposed to take it, but sent for it several times; and, although he desired a front seat to be added to it, as he had previously paid for it, and it was a specific thing then in existence, it became the property of the plaintiff, and he had a right to take it away whenever he pleased: and, although he left it on the bankrupt's premises to be sold for him,

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the bankrupt had no right to expose it on his own account; nor could he divest the plaintiff of his property in it, whether the seat were added or not. It was, therefore, not in the possession of the builder as owner, nor in his order or disposition as reputed owner, with the consent of the true owner. This case, consequently, falls within the principle established in *Woods v. Russell*, and disposes of the *second* objection, as the bankrupt treated the chariot as being the property of the plaintiff, who must be considered the true owner from the moment he paid for it, for he had then a right to demand and take it away, whether the new seat were added or not. With respect to the *third* objection, although I entertained but little doubt at *Nisi Prius*, and was strongly inclined to think that it was of little, if any, weight, yet, as it raises a question of considerable and general importance, it is fit that we consider that question before we deliver a final opinion.

Mr. Justice PARK.—I am of opinion that there is no valid ground for either the first or second objections, and I think the assignees ought not to have set up such a defence. I am not prepared to go the full extent the Court did in the case of *Mucklow v. Mangles*; but this case appears to me to be totally different from it, and to fall expressly within the distinction taken by Mr. Justice *Heath*, namely, that, “if the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made.” Here, the chariot was complete as a travelling chariot, and the plaintiff merely wished to have an additional seat, and the contract was complete when he paid the full price of it, the thing being then in actual existence. With respect to the objection—that the chariot was within the order or disposition of the bankrupt with the consent of the true owner—It would be a violation of common sense to say that it was. Notwithstanding that the plaintiff might have desired it to be sold, still he sent for it several times after he had

directed the seat to be added, and the bankrupt promised to deliver it.

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Mr. Justice BURROUGH.—I entertain no doubt on any of the questions, but think, with my Lord Chief Justice, that, as the last is of general importance, it requires consideration.

Mr. Justice GASELEE.—I have no hesitation on the two first points. The answer to the first objection is, that the chariot was completed, and the plaintiff had paid the full price for it. With respect to the second objection, if we were to hold that the chariot was in the order or disposition of the bankrupt with the consent of the true owner, if a person were to send his carriage to his coach-maker to have it repaired, even in the most trifling degree, he would be liable to have it taken under a commission issued against the maker. Possession within the meaning of the statute, must be lawful possession; and here, there could be no doubt but that the plaintiff was lawfully possessed. With respect to the last objection, I must confess I feel considerable doubt upon it, as I do not well see how a distinction can be drawn between the commissioners and assignees of a bankrupt, who both act under the commission.

Cur. ade. vult.

Lord Chief Justice BEST now delivered the judgment of the Court, as follows:—My brother *Park*, my brother *Burrough*, and myself, entertain no doubt whatever as to the *third* objection which has been raised in this case; and, although my brother *Gaselee* still does, yet he is not prepared to say that he differs so materially from the rest of the Court as to express his entire dissent from the opinion we have formed. The question is, whether, in trover against the assignees of a bankrupt, it is necessary that

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the action be commenced within three calendar months next after the fact committed, *viz.* the alleged conversion by the defendants, under the 44th section of the late statute, which was passed to amend the laws relating to bankrupts. When the objection was raised at *Nisi Prius*, I felt that, if it were tenable, it would be most alarming to persons engaged in commerce in this country; and that, if the Legislature did not interfere and set the matter right, it would be productive of the greatest injury to mercantile interests; for thus, persons who send goods from all parts of the world to this country, for consumption, would be deprived of all redress, if, in case of their agent's bankruptcy, and their inability to lay claim to their property, or commence proceedings for its recovery, within three months, their right to such property should cease to exist. This I thought would be highly destructive to the interests of the country, and, therefore, trusted that the Legislature did not intend that a case of this description should fall within the meaning or operation of the 44th clause of the act; as, if it did, it would occasion very much mischief. Having carefully looked at the statute since, I entertain the same opinion now that I did at the trial, although I wished that opinion to be strengthened and sanctioned by the Court, and I, therefore, thought it most fit to reserve it for their consideration. [Here his Lordship read the whole of the 44th section.] It would be most extraordinary if the Legislature should intend to mulct a party with double costs, for failing to establish an ordinary right or claim against assignees of a bankrupt. Why then should such assignees be placed in a different situation from others? Or, why should a bankrupt's estate be distinguished from any other property, so as to protect his assignees? If the plaintiff had claimed a right to the bankrupt's property, and had failed in establishing it as against him, he would only have been liable to pay the usual charges, namely, his single costs. Why then should a party be placed in a different

situation from those who are liable only to single costs, because he chooses to assert a right against the assignees of a bankrupt? It appears to us to be impossible that the Legislature could have so intended it. Undoubtedly, the words of the act are very general, for they refer to *every action* brought against *any person* for *any thing* done in pursuance of the act. Now, on a careful perusal of the statute, it appears, that scarcely any acts are to be done by the assignees, but what relate to the disposal of the bankrupt's property after it is delivered to them, or has come into their possession. The act of taking possession in the first instance, is by virtue of a warrant from the commissioners, under which the messenger acts, and he seizes the property accordingly. The assignees are total strangers to the act of taking possession; all their duty is to dispose of the property after it has been assigned or delivered to them; and what they do with regard to any pecuniary arrangements, cannot be applied to a *thing done* in pursuance of the statute, but to an act done by them in right of property of the bankrupt put into their hands, with the acquiring of which they had nothing to do. My brother *Park*, my brother *Burrough*, and myself, therefore, think that the 44th section was only intended to operate as to *things done* for the purpose of taking possession of the bankrupt's property, and, therefore, that it must be confined to acts done by the commissioners, who may be considered as public officers, and messengers, or others, who act under their warrants. It is highly proper that such persons should have a certain degree of protection thrown around them, which others have not (and which it is unnecessary to extend to assignees), because persons acting as public functionaries have no funds to answer the expense of actions brought against them; and it is, therefore, fit, in case they succeed, that they should recover double costs: but the assignees ought not to be entitled to such costs, because they have the property of the bankrupt in their

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hands, and may indemnify themselves, from his estate, against the consequences of any act which they may have done in their character of assignees. As, therefore, the assignees have a right to funds to be drawn from the bankrupt's estate, they must be considered as standing in the situation of the bankrupt himself. It, therefore, appears to us to be clear that they do not fall within the provisions of the 44th section of the statute. But it has been said, that the Court of *King's Bench* has, in effect, expressly decided this point in the case of *Wallace v. Smith*. But, if that case be looked at, it will appear to be altogether distinguishable from the present. If the protection afforded by the 184th section of the statute 39 *Geo. 3*, did not apply to the Dock Company, it could apply to no one; for there were no commissioners, no superior persons who were to direct what was to be done; the company alone were to be the actors in all cases, and in the first instance; and, by the 184th section, they could only sue and be sued in the name of their treasurer. He was their agent, and, by the terms of the statute, represented the company; and if he could not be sued for an act of spoliation committed by them, the injured party would be altogether without remedy. But the protection given by that act applied to the company or the person who represented it; and Lord *Ellenborough* there concluded his judgment, by saying: "The plaintiffs themselves have, by their own action and declaration, so far put a construction upon the thing done, as having been done under colour of the act, that they have made the *treasurer* defendant, in a case where the only grievance complained of is imputed to the *company*." Besides, the words of the act in that case are very different from the present; as there, no action was to be commenced against any person or persons, for any thing done in pursuance or under colour of the act, until fourteen days' notice should be thereof given in writing. The words "*under colour*" are omitted in this case; and they certainly carry the meaning

of the act far beyond the general words “*any thing done in pursuance of*” the act. In the late case of *Sellick v. Smith, Keeling, and Drake*, where one of the defendants was the treasurer of the *West India Dock Company*, I decided, that he was entitled to the protection of the statute 39 Geo. 3, on the authority of *Wallace v. Smith*; and the Court afterwards confirmed my decision, and refused an application to set aside a verdict which had been taken for the treasurer; and we held, that, although he had taken a bond of indemnity from the two other defendants, it was not a waiver of his protection under the statute. But both these cases are distinguishable from the present, as there, there was no other person but the treasurer to answer the description of the party protected by the act; he alone was the actor, and represented the company, and was made the only person to be responsible for their acts. But here, the assignees do not act at all, except in the disposition and distribution of the bankrupt's property; and then they act in right of such property which has been previously acquired, and not by virtue of any power conferred on them by law, or for any special purpose under the act. On the whole, therefore, it appears to us that this case does not fall within the words or spirit of the act; and that, if we were to extend it to the case of assignees, it would be productive of the greatest inconvenience and mischief. This rule, therefore, must be—

Discharged (a).

(a) See *Theobald v. Crichtmore*, 1 Barn. & Ald. 227.

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In *assumpsit* against an attorney for negligence in the conduct of a suit, the declaration contained several special counts, and the usual money counts. The defendant paid money into Court, sufficient to cover the plaintiff's demand on the latter counts.

The cause was referred under an order of *Nisi Prius*, and the arbitrator found that the plaintiff had *good cause of action* for 23*l.*, and directed a verdict to be entered for him for that sum. Judgment was entered up on the whole declaration, and costs taxed accordingly:—

Held, that the award was sufficiently certain, as the arbitrator had, in effect, ordered a general verdict to be entered for the plaintiff on the whole of the declaration.

Although the objections to an award ought to be specified in the rule *nisi* to set it aside, yet the Court is not precluded by the

omission from entering into any valid objection that may be raised to the award.

DICAS, Gent., One &c., v. JAY, and Another, Gents., two &c.

THIS was an action of *assumpsit*, by the plaintiff, an attorney at *Chester*, against the defendants, his agents in *London*, for negligence in the conduct of a cause. The declaration contained eleven special counts, charging the defendants with neglect of duty in various transactions during the progress of the suit, which were independent and distinct from each other. To these were added the common money counts. The defendants paid into Court money sufficient to cover the plaintiff's demand on the latter counts.

At the Sittings after the last *Easter* Term, before Lord Chief Justice *Best*, at *Westminster*, the cause, and all matters in dispute between the parties, were referred to arbitration, under an order of *Nisi Prius*. The arbitrator made his award in the course of the last vacation, finding that the plaintiff had *good cause of action* against the defendants for 23*l.* 14*s.* 10*d.*, and directing a verdict to be entered for the plaintiff for that sum. Judgment having been entered up, and the costs taxed for the plaintiff, on the whole declaration—

Mr. Serjeant *Cross*, on a former day in this Term, obtained a rule *nisi* that the award, and all subsequent proceedings thereon, might be set aside, on the ground that, as all the matters in dispute between the parties had been referred to the arbitrator, and he had only found that the plaintiff had *good cause of action* against the defendants, the award was bad for uncertainty; as the arbitrator ought to have stated whether it was the negligence imputed to the defendants in the special counts that was the *cause of action* on which his award was founded, or whether he con-

finer it to the common counts; and that he ought to have directed the verdict to be entered on those counts only to which the finding applied; for that, if the plaintiff had no cause of action against the defendants for negligence, his demand on the money counts was covered by the sum paid into Court.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Jones*, now shewed cause.—As the objections to the award were not stated in the rule *nisi*, the application to set it aside cannot be supported. Although there is no rule in this Court similar to that which is observed in the Courts of *King's Bench* and *Exchequer*, viz. that, when a rule *nisi* to set aside an award is obtained, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, must be stated in the rule; yet the practice in this Court has long since been conformable to that rule. But, independently of this, the award is sufficiently certain, and the arbitrator has, in effect, directed a general verdict to be entered for the plaintiff on all the counts of the declaration; and, as judgment has been entered up and the costs taxed accordingly, the Court will not now interfere; for, if any objections were intended to be raised to the award, they should have been made before judgment signed.

Mr. Serjeant *Cross*, and Mr. Serjeant *Russell*, in support of the rule.—The question of negligence, as well as what sum might be due from the defendants to the plaintiff, for money advanced by him during the progress of the cause, was left to the arbitrator. He should have shewn on which counts he had made his award, and the verdict should have been confined to those counts. In *Dillon v. Rimmer* (a), where the plaintiff sued the defendant on a

(a) 7 B. Moore, 427; S. C. 1 Bing. 100.

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bill of exchange, on which he had no good cause of action, and the declaration contained a count on the bill, and the common money counts, and the Jury found a general verdict for the plaintiff—the Court ordered it to be entered on the common counts, in order to deprive the plaintiff of his costs. So, here, the verdict ought to be entered according to the justice of the case. There were several distinct causes of action referred to the arbitrator, who was substituted for a Jury, and his award is subject to the equitable control of the Court. If any injustice has been done, they will set it right; but as there is no established rule of practice in this Court, requiring the objections to an award to be stated in the rule *nisi*, and as this is a mere technical objection, it ought not to avail.

Lord Chief Justice BEST.—I do not think that the practice as to stating the objections in the rule *nisi* to set aside an award, is so inflexible or conclusive as to control us, or prevent us from hearing the objections, although they be not specified in the rule. From the last edition of *Tidd's Practice* (a), it appears, that, although the Court of *Exchequer* has adopted the rule of the Court of *King's Bench*, in this respect, yet that there is no such rule in this Court. But here, it seems to me that the arbitrator has, by the terms of the award, precluded us from entertaining the question. He appears to have awarded on the whole matters referred to him, and, in effect, has directed a verdict to be entered for the plaintiff on the whole declaration; for he has found that the plaintiff had *good cause of action* against the defendants for a certain sum, and has directed a verdict to be entered for the plaintiff for that sum. That must be taken to amount to a general verdict. Besides, judgment has been entered up, and the costs have been

(a) 9th Edit. 845

taxed, accordingly. The application to set aside the award, therefore, is made too late.

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Mr. Justice PARK.—I must confess that I am not altogether satisfied with the terms of this award; but the objections to it should have been stated in the rule *nisi* for setting it aside. I agree, however, with my Lord Chief Justice, there being no rule in this Court, as in the *King's Bench*, and *Exchequer*, that we are not precluded from entering into the objections, though they be not specified in the rule. In moving to set aside an annuity, the grounds on which the application is founded must be stated to the Court. But here, it appears to me that we are concluded by the finding of the arbitrator, for he has, in effect, awarded on all the matter referred to him, and has directed a general verdict to be entered for the plaintiff; and, as judgment has been entered up accordingly, it is now too late for us to interpose.

Mr. Justice BURROUGH.—Although we have no written rule in this Court, yet it has long since been the practice, on a motion to set aside an award, to state the objections in the rule *nisi*. That appears to me to be a most wholesome rule, and one which ought not to be relaxed. But this award is sufficiently certain and perfect upon the face of it, and the arbitrator has, in terms, found that the plaintiff is entitled to damages on the whole cause of action referred to him. At all events, we cannot see that any injustice has been done.

Mr. Justice GASELEE.—There is no specific rule in this Court, with respect to setting out the objections to an award in the rule for setting it aside. The award in this case appears to me to be unobjectionable upon the face of it; at all events, it is in the discretion of the Court to

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hear the objections, whether they be stated or not, and we might either enlarge the rule, or grant indulgence to the party against whom the application is made, so that neither of the parties might be prejudiced thereby. The award is not uncertain; for the arbitrator has found that the plaintiff had *good cause of action* against the defendant for 23*l.* 14*s.* 10*d.* That, therefore, in effect, is the same as if he had said that the plaintiff had good cause of action, to that amount, on the whole declaration; and he has directed the verdict to be entered up for that sum. Besides, judgment has been entered up, and the costs have been taxed; and, as the arbitrator does not appear to have mistaken the law, the Court will not set aside his award, unless the principles on which he has decided appeared upon the face of it. I therefore concur with the Court in thinking that this rule must be—

Discharged.

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Nov. 27th.

In re HOUGHTON and FALLOWES.

A rule *nisi* for an attachment for non-payment of money, pursuant to an award, was intitled, "In the Matter of *A.* and *B.*;" but the affidavit of service was intitled, "Between *A. B.*, plaintiff, and *C. D.*, defendant:"—*Held*, irregular, as the affidavit should have been intitled the same as the rule.

A RULE *nisi* had been obtained by Mr. Serjeant *Taddy*, for an attachment against *John Fallows*, for non-payment of money, pursuant to an award made by an arbitrator to whom certain disputes that had arisen between *Fallows* and one *Houghton* had been referred. The submission was made by virtue of a written agreement which was made a rule of Court. No action had been previously brought. The rule *nisi* for the attachment was intitled, "In the Matter of *Houghton* and *Fallows*;" but the affidavit of service was intitled, "Between *Matthew Houghton*, plaintiff, and *John Fallows*, defendant." It was thereupon objected by the Secondary, that the affidavit was improperly intitled, as it should have been intitled the same as the rule.

The Court held the objection to be valid, and—

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The learned Serjeant took nothing by his rule (a).

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(a) See *Bainbrigge v. Houlton*, 5 East, 21, where it was held that affidavits in support of, or in answer to, a rule for setting aside an award, made a rule of Court under the statute 9 & 10 Wm. 3, c. 15, s. 1, there being no action previously brought, nor any cause in Court, need not be intitled; and a note to that case, where it is said, “that, where an *attachment* is applied for, for non-performance of an award, the affidavits in answer to the rule must be intitled, ‘The King v. —;’ though those upon which the rule was obtained need not be intitled where there was no cause previously in Court. *Bevan v. Bevan*, 3 Term Rep. 601. But, where the reference arises

from an order of *Nisi Prius*, there being then a cause in Court, the affidavits, either for a rule to set aside the award, or for an attachment for non-performance of it, are intitled *in the cause*. But, after the rule *nisi* granted for an attachment, the affidavits in answer to such rule must be intitled, ‘The King v. —.’” And in *Whitehead v. Firth*, 12 East, 165, it was held, that affidavits made in answer to a rule *nisi* for an attachment, must be intitled on the *Civil* side of the Court, in the cause out of which the motion arises; but, that, after the rule for the attachment is granted, the affidavits in any matter concerning such attachment, are intitled on the *Crown* side.

UNTHANK, *Ex parte*.

MR. Serjeant *Wilde*, on a former day in this Term, moved, that the applicant might be admitted and enrolled an attorney of this Court, on the following affidavit:—

“*John Unthank*, of *North Walsham*, in the county of *Norfolk*, Gentleman, maketh oath, and saith, that he took the degree of Bachelor of Arts in the University of *Cambridge*, in the year 1822, in order to enable him to take advan-

Friday,
Nov. 23th.

A gentleman who had taken the degree of Bachelor of Arts at *Cambridge*, articulated himself to an attorney for three years, but served only two months and abandoned the contract. After the expira-

tion of the three years mentioned in the original articles, he was assigned to another attorney, with whom he served two years and ten months:—*Held*, that, as the original articles had *expired* previously to the assignment, the service under the assignment was not a service within the terms of the statute 1 & 2 Geo. 4, c. 48, s. 1.

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tage of an act then lately passed, intituled, ' An act to amend the several acts for the regulation of attornies and solicitors (a);' that he was, by a contract in writing, dated on or about the 6th *February*, 1823, bound to *William Day*, of the city of *Norwich*, Gentleman, to serve him in his practice of an attorney and solicitor for the term of *three* years thence next ensuing; that he continued with, and was employed by, the said *William Day* as his clerk, under such contract, until the 20th *April* following, when the deponent quitted the service of the said *William Day*; that, at the time of the deponent's entering into the said contract, he really and *bond fide* intended to continue the

(a) 1 & 2 *Geo.* 4. c. 48, the 1st section of which (as amended by the statute 3 *Geo.* 4, c. 16), enacts, that, " in case any person who shall have taken the degree of Bachelor of Arts, or Bachelor of Law, either in the University of *Oxford* or *Cambridge*, or in the University of *Dublin*, shall, at any time after he shall have taken such degree, be bound by contract in writing to serve as a clerk, for and during the space of *three* years, to an attorney or solicitor, &c., in some or one of the courts of law or equity in the therein recited acts of the second, seventh, and twenty-second years of the reign of King *George* the Second mentioned; and during the said term of three years *shall continue* in such service, and during the whole term of such three years' service *shall continue* and be actually employed by such attorney or solicitor, or his agent or agents, in the proper business, practice, or employment of an attorney or solici-

tor; and shall also cause an affidavit of himself, or of such attorney or solicitor to whom he was bound as aforesaid, to be duly made and filed, that he hath actually and really so served and been employed, during the said whole term of *three* years, in like manner as is required by the said recited acts with respect to persons thereby required to serve for the term of *five* years, shall and may be qualified to be sworn, and to be admitted and enrolled as an attorney or solicitor respectively, according to the nature of his service, in the several and respective courts of law or equity, as fully and effectually, to all intents and purposes, as any person having been bound and having served *five* years is qualified to be sworn, and to be admitted or enrolled, under or by virtue of the said recited acts, or any other act or acts for the regulation of attornies or solicitors in *England*."

service as such clerk for the said term of *three* years, in order to qualify himself to be admitted an attorney of one of his Majesty's Courts at *Westminster*; that, subsequently to his entering into such contract, circumstances arose which compelled him to abandon his service under the same contract; and that such circumstances continued to operate until a short time before the month of *July*, 1825, when the deponent was assigned to *William Unthank*, of the city of *Normich*, Gentleman, to serve him as his clerk in the practice of an attorney and solicitor, for the remainder of the term of *three* years; that the circumstances before referred to were not existing circumstances at the time of such contract with the said *William Day*, nor then likely to arise; and that, for a part of the time which elapsed between the period of quitting the service of the said *William Day*, and being assigned to the said *William Unthank*, the deponent resided in *England*, and subsequently (during the same period), with the knowledge and consent, and upon an allowance from, the said *William Unthank*, his father, went to *France* to improve himself in the language of that country."

The learned Serjeant referred to the case of *Ex parte Smith* (a), where an articted clerk, who had served two years and a half with an attorney who died before his clerkship was completed, after an interval of six years from that time, moved for leave to serve the remainder of his clerkship with another attorney, with a view to his admittance—Mr. Justice *Bayley* said, "That he thought the application unnecessary, it being quite competent to the party to serve the remainder of his clerkship with any other attorney. All that was necessary to qualify him for admittance was, that he should serve a clerkship of *five* years with an admitted attorney; and it was of no importance, with that view, with whom that clerk-

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(a) 1 Dow. & Ryl. 14.

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ship was served. His actual admittance would be a matter for future consideration, when the term of his clerkship had expired, and he applied for admittance. On general principles, he was at liberty to serve the remainder of his time with another master."

The learned Serjeant submitted, that the three years' service required under the statute 1 & 2 Geo. 4, need not be consecutive; and that, on the authority of the above case, the service by Mr. *Unthank*, the applicant, under the two contracts, was sufficient to entitle him to be admitted.

Cur. adv. vult.

On this day, Lord Chief Justice BEST said, that, though it was a case of considerable hardship, still the Court could not consistently with law accede to the application, as the term of the original articles with Mr. *Day* had *expired* before the assignment; and, as the assignment was not of itself a new contract of service, but merely a transfer of the old one, there was not any service under a contract within the meaning of the statute.

The learned Serjeant, therefore, took nothing by his motion.

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Friday,
Nov. 28th.

The Earl of FALMOUTH v. GEORGE.

THIS was an action of debt (a). The *first* count of the declaration stated—That the defendant, on the 1st *October*, 1824, in the county of *Cornwall*, was indebted to the plaintiff in divers, to wit, fifty fish, of great value, to wit, of the value of 10*l.* of lawful money of *Great Britain*, then and there due and of right payable and renderable by the defendant to the plaintiff, as and for certain tolls of, for, and in respect of, divers, to wit, fifty cargoes of fish, by the defendant before that time brought from the sea, in divers boats then and there used by the defendant, into a certain cove in the county aforesaid, called *Sennen Cove*, and there landed; each of the said fish respectively being then and there the second best fish of and in each of the said cargoes of fish respectively; in which said cove the plaintiff then, and for a long time before, had a certain capstan, and a certain rope belonging thereto, for the hauling up of the boats of all such fishermen coming into the said cove with boats used by them, as were desirous of using the same for that purpose, and who were

The plaintiff claimed a right, under a custom, to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove and landing fish therein. It was proved that the plaintiff and his ancestors had, from time immemorial, furnished and maintained a capstan and rope for the use of the fishermen; and that in stormy weather boats could not be drawn up from the sea, with safety to the crews, without them; that the spot on which the capstan stood be-

longed to the plaintiff, but the rest of the cove, over which the boats were drawn, was the property of a third person:—*Held*, that the keeping the capstan and rope was a good consideration for the exaction of toll from all boats landing in the cove, whether the capstan and rope were used or not. *Held*, also, that a fisherman frequenting the cove was not a competent witness to disprove the existence of the custom, as he had an immediate interest in the event of the suit; for, if the defendant obtained a verdict, the witness would thus be protected from the consequences of the non-payment of tolls by himself.

(a) See *The Earl of Falmouth v. Penrose*, 6 Barn. & Cress. 385, where it was held that an action of *indebitatus assumpsit* was not maintainable by the plaintiff to try his right to the second best fish out of the cargoes of all fishing-boats landing in *Sennen Cove*, in respect of his liability to keep up

a capstan and rope there for the purpose of hauling the boats out of the sea; and that, there being no legal liability on the part of the defendant to pay or render any given fish to the plaintiff before selection, the law would not imply a promise on his part to do so.

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entitled to use the same for that purpose: accordingly, and by reason thereof, the plaintiff then and there was entitled and had a right to the same tolls: whereby an action had accrued to him, &c.

The *second, third, fourth, fifth, and sixth* counts, were founded on the same demand, merely varying the mode of stating it.

The *seventh* count alleged, that the defendant was indebted to the plaintiff, "in divers, to wit, fifty other fish of great value, to wit, of the value of 10*l*., for so many fish before that time had and received by the defendant to and for the use of the plaintiff."

The *eighth* count was in *detinue* for the fish.

The defendant pleaded "that he did not owe or detain the fish above demanded, or any of them, in manner and form as the plaintiff had complained against him:" on which issue was joined.

At the trial, before Mr. Justice *Burrough*, at the Summer Assizes for the county of *Cornwall*, in 1827, the plaintiff claimed a right, under a custom, to take the second best fish out of every boat-load of fish, by way of toll, from the fishermen frequenting a cove or inlet called *Sennen Cove*, and landing their fish there. It appeared that *Sennen Cove* was situate on the sea shore, and was the property of a Mr. *Williams*, the owner of a large estate or farm adjoining, called *Mayen Farm*, with the exception of that part on which the capstan stood, which had been in the possession of the plaintiff and his ancestors, the owners of a farm in the neighbourhood, called *Penrose Farm*, for as long a period as the oldest witnesses could remember; that this part was separated from the rest of the cove by a wall that surrounded the capstan; that the space between this wall and the sea, over which the boats were drawn by the capstan, was left open, and was the property of Mr. *Williams*, to whom the rest of the cove belonged. It also appeared that the cove was rendered a proper place for the landing of boats, by manual labour; that

a track had been made for the hauling up boats, to a place in the cove above high water mark; and that, in tempestuous weather, boats could not be hauled up from the sea, with safety to the crews, without the assistance of the capstan and rope. The plaintiff also proved that the capstan and rope had from time immemorial been kept, maintained, and repaired, by him and his ancestors, and were frequently used by the fishermen to haul up their boats in the cove; that the capstan and rope had always been supplied and repaired by the proprietors of *Penrose Farm*, although it was proved that, on one occasion, the fishermen themselves had furnished a rope. It also appeared that it was always the custom for persons using the cove to place the second best fish out of every boat-load landed in it, on a particular rock in the cove, and there leave it, if no person from *Penrose Farm*, which was distant about two miles, was present at the cove to receive it. This custom was proved to have been invariably acquiesced in by the fishermen, up to the year 1816, when they refused to submit to it any longer. The second best fish, which was called the land fish, was payable whether the capstan was used or not, and also the smallest or worst fish, which was termed the rope fish, but which was seldom, if ever, demanded.

For the defendant, a witness was called to disprove the custom, who admitted that he was a fisherman, and that he had been, and then was, in the habit of frequenting *Sennen Cove* as such, when his testimony was rejected by the learned Judge, he being a person interested in the event of the suit, inasmuch as he would be exonerated from the future payment of the toll, in case the custom should be negatived.

The learned Judge, in summing up to the Jury, said, that, if they found that it had always been the custom for the plaintiff and his ancestors to provide and maintain the capstan and rope, the mere fact of the fishermen having

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supplied a rope on one or two occasions would be no bar to the custom.

The Jury found, that, whether the capstan and rope were used or not by the fishermen frequenting the cove, the plaintiff was entitled to the second best fish out of every cargo landed in the cove, and they found a verdict for him—damages one shilling.

Mr. Serjeant *Bosanquet*, in *Michaelmas* Term, 1827, obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, on the grounds—*First*, that the plaintiff had proved no legal right to claim the tolls in question, as such right must originate from a grant from the Crown, which could not be presumed; and that, at all events, the plaintiff had not shewn any consideration that would entitle him to claim toll from those fishermen who did not use the capstan and rope: and therefore that the verdict could not be supported—*Secondly*, that the testimony of the witness tendered on behalf of the defendant had been improperly rejected.

Mr. Serjeant *Wilde*, in the last Term, shewed cause.—As the cove in question was proved to have been formed by artificial means, or the work of man, rocks having been removed, and a track made for the hauling up boats from the sea by means of the capstan and rope; and as the owners of *Penrose Farm* had for time out of mind been in the habit of repairing the capstan, and supplying the rope; these were circumstances of themselves sufficient to raise a presumption that the soil of the whole cove formerly belonged to the plaintiff's ancestors, as the owners of the *Penrose* estate; and although the cove, with the exception of the spot on which the capstan stands, is now the property of Mr. *Williams*, still the only persons who were proved to have ever exercised any acts of ownership over it were the plaintiff and his ancestors, or those under whom

they claimed, as the owners of the *Penrose* estate: and it appears that, until the year 1816, the usage had been invariably acquiesced in by the fishermen frequenting the cove. As, therefore, the presumption is that the cove was formed by the owners of the soil, to whom it originally belonged; and that the proprietors of the *Penrose* estate have since invariably maintained the capstan and rope; the claim of the second best fish is in the nature of a toll traverse, for which no consideration need be shewn. In *Fitzherbert's Natura Brevium* (a), it is said that "toll traverse may be by prescription or grant, and is for passing over another's land:" and in *Comyns's Digest* it is said (b), "Toll traverse is a sum demanded for passage over the private soil of another, and this toll may be demanded without alleging any consideration for it;" and the case of *James v. Johnson* (c), is referred to in support of the latter part of that position. There it was held, that, in prescribing for toll, the particular kind of toll must be stated; for, if it be *toll thorough*, a consideration must be laid; but, if it be *toll traverse*, a consideration is implied. In *Lord Pelham v. Pickersgill* (d), it was held, that, if a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were, before the time of legal memory, in the same hands, though severed since, it shall be presumed that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand: and Mr. Justice *Ashurst* there said (e): "It is properly admitted, that toll thorough cannot be supported without shewing a consideration; but toll traverse may: and the reason is, that

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(a) 227, n. 8th edit. 518, n. (c).

(d) 1 Term Rep. 660.

(b) Tit. *Toll* (D).

(e) Id. 667.

(c) 2 Mod. 143.

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the very circumstance of passing over the soil of a private person, where the public had no right before to pass, imports a consideration. At the same time, if this were a new case, we should inquire into the reason of this distinction; because, in every case which requires a consideration, it ought from length of usage to be presumed. For the rule with regard to prescriptions is, that every prescription is good, if by any possibility it can be supposed to have had a legal commencement. That is the general rule, and I cannot see why a good consideration for toll thorough cannot be presumed, as well as for toll traverse; because the giving of the soil to the public is in itself a good consideration. But, in all probability, the distinction arose from the difficulty in most cases of shewing that the toll and the ownership of the soil were coeval." And Mr. Justice *Buller* said (a): "The question is, whether the Court can say that the subjects have a general and unqualified right of way. If they do, it will be directly contrary to the finding of the Jury; for they have found that there is no right of way but on paying the toll." So, here, it was proved that the toll claimed was coeval with the right of landing fish; and the fishermen using the cove had not a general and unqualified right to land fish, but only upon payment of the toll: and as the right claimed by the fishermen was, to pass over the soil of an individual, and over that part of the cove which was formed by the art of man, and the toll and passage claimed were coeval, there is sufficient consideration to support a toll traverse, notwithstanding that the toll and the original ownership of the soil might have been severed. At all events, it must be presumed that, at the time the cove was formed, both the soil and the toll were in the owner of the *Penrose* estate. In *Richards v. Bennett* (b), it was

(a) 1 Term Rep. 668.

(b) 1 Barn. & Cress. 223; S. C. 2 Dow. & Ry. 389.

held, that, to support a claim of toll traverse, a special consideration need not be shewn. That was an action of trespass. The lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which, from time immemorial, had been parcel of the manor—it was held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough; it was also held, that, where a legal commencement of a prescription can be presumed, it is, after verdict, sufficient to support the claim: and on the case of *Crispe v. Belwood* (a) being there referred to, to shew that toll traverse is good without shewing any consideration or charge, Mr. (now Lord Chief) Justice *Best* said (b): “The argument for the defendants in that case, which appears to have been adopted by the Court, is very important for the present defendants; it is thus stated: ‘And it may be intended, that all the lands within the manor are demesnes of the manor, for so they were at first, till the lord divided them among his tenants. And supposing that those lands are not now parcel of the demesnes, but given to the tenants in fee, yet the prescription may have a reasonable commencement, viz. that, when the lord divided those lands among his tenants, he reserved this toll, for landing of goods, to himself.’” And Lord Chief Justice *Abbott*, in delivering his judgment, said (c): “The plea alleges, not only that the manor has existed from time immemorial, but also that the town of *Farringdon* has, from time immemorial, been part of the manor. It is, therefore, to be presumed, that, before the time of legal memory, the site of the town belonged to the

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(a) 3 Lev. 424.

(b) 1 Barn. & Cres. 227.

(c) Id. 231.

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lord. It is also alleged, that the toll has been paid immemorially. We may, therefore, fairly infer that the toll was originally granted to the lord, in consideration of his consenting that the soil of the manor should be laid out in the streets of the town." And Mr. Justice *Bayley* said (a): "If a legal commencement of the claim to this toll can be presumed, that is now sufficient, a verdict having been found for the defendants. This toll may fairly be presumed to have been granted at a time when the lord of the manor was also owner of the soil, in return for the dedication of a part of that soil to the public."

If even it were necessary to shew a consideration, it has been done in this case. The plaintiff proved that the cove was formed by artificial means, expressly for the accommodation of the owners of boats who landed fish there: it was, therefore, a partial dedication of the cove to the use of certain individuals, for which toll was payable. In the case of the *Mayor of Yarmouth v. Eaton*, Lord *Mansfield* said (b): "The making a port is itself a consideration." And Mr. Justice *Denison* said: "The consideration is self evident, *vis.* the benefit to the subject." In *Colton v. Smith* (c), a prescription as lord of a manor, for toll of all goods landed within the manor, in consideration of repairing a wharf within the manor, was held to be good; and it was there admitted, that, in toll traverse, no consideration was necessary, because it is implied. But here, the repairing the capstan, and supplying the rope, which were necessarily used in certain states of the tide, as well as in stormy weather, as boats could not be drawn up from the sea with safety without them, is, of itself, a sufficient consideration; and as the plaintiff was bound to provide them, the owners of the boats landing at the cove, were liable to toll whether they used them or not.

With respect to the rejection of the testimony of the witness called to disprove the custom under which the

(a) 1 Barn. & Cress. 223. (b) 3 Burr. 1406. (c) Cowp. 47.

plaintiff sought to establish his claim—He was himself a fisherman, and in the habit of frequenting *Sennen Cove* up to the time of the trial. His testimony, therefore, was properly excluded, he being liable to the payment of the customary toll, and interested in the event of the suit; for, in case the plaintiff obtained a verdict against the present defendant, the record would be evidence against the witness in an action brought against him for breach of the same custom. In the case of the *City of London v. Clerke* (a), the plaintiffs prescribed for a toll on malt brought by any of the west-country barges to *London*. At the trial, the plaintiffs offered in evidence four several verdicts obtained against west-country malsters, and it was contended that these verdicts could not be admitted in evidence against the defendant, he being neither party nor privy to those records—the Court held that they should be given in evidence; for that it is as reasonable that a recovery against a stranger should be given in evidence, as that payment of the duty should be proved by other strangers, which was never yet doubted; and Lord Chief Justice *Holt* said: “If a lord of a manor claims suit of his tenants, *ad molendinum*, by custom, &c., and in an action recovers against one tenant, that recovery may be given in evidence in a like action to be brought against other tenants, unless the defendant can shew any covin or collusion between the parties in the first action.” This verdict, therefore, would be evidence against the witness, although the suit was between other parties. In *Buller’s Nisi Prius* (b), it is said: “The exception of its being *res inter alios acta*, is not allowed against verdicts in case of customs or tolls; for the custom of toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts, or to such verdicts as have found and determined

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(a) Carth. 181.

(b) 7th Edit. by Bridgman, 233 a.

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them; and, in such case, it is not material whether such verdicts be recent or ancient." When a right is claimed by custom, a person who claims under the same custom cannot be a witness in support of the claim, as he might afterwards use the verdict in his own cause to establish a similar customary right for himself. In *Hockley v. Lamb* (a), Lord Chief Justice *Holt* ruled, that, "if *A.*, *B.*, *C.*, *D.*, and *E.*, claim common in a place called *Dale*, exclusively of all other persons, and the common of *A.* comes into dispute, *B.* may be a witness to prove that *A.* has right of common there; because in effect it charges himself, *viz.* he admits another to have common with himself. But, if the prescription be, that all the inhabitants of *Blackacre* ought to have common there, one of the inhabitants cannot be a witness to prove that another of the said inhabitants ought to have common there, because in effect he would swear to give himself right of common there." And, in *Bent v. Baker*, Lord *Kenyon* said (b): "It is very probable that, in *prescriptive* rights of common, other persons living in the same manor may have correspondent rights; yet, unless the question turns on a *custom* equally beneficial to them all, the testimony of one must be admitted to prove his neighbour's right. But, if the right be claimed under a *custom* that all the inhabitants of the parish shall have a right of common, all those that fall under that description are interested, because the verdict in that cause may afterwards be used as evidence to establish the same right in the rest." Here, the testimony of all persons who did not appear to be fishermen, or in the present habit of frequenting the cove, was admitted; but when it appeared, that the witness in question, on the *voir dire*, said, that he was in the habit of frequenting the cove as a fisherman, and using the capstan and rope, his testimony was properly rejected; he being called for the purpose of

(a) 1 *Ld. Raym.* 731.

(b) 3 *Term Rep.* 32.

shewing that what he himself had done was not a breach of the custom. In the case of *The Carpenters' Company v. Hayward* (a), which was an action against the defendant for exercising a trade in breach of a custom, confining, as was alleged in the declaration, that and other trades to the members of a corporate company; a witness who claimed for himself a right to exercise a trade, though not a member, was held to be incompetent to negative the existence of the custom, as he was interested to procure a verdict for the defendant, which would be evidence for himself, in case a similar action should be brought against him. Lord *Mansfield* there said, "The witnesses rejected were clearly interested in the question. If the company had failed in establishing the custom, they would have been discharged from actions to which they are liable for the breach of it." That is precisely in point. So, in the case of the *Earl of Clanrickard v. Lady Denton* (b), where the question was, whether, in a particular parish or vill, certain things were generally exempted from tithes, or subject only to a *modus*, it was held that no person who would be subject to tithes, if the parson's claim were to be allowed, could give evidence in support of the *modus* or exemption. These authorities are conclusive to shew that the testimony of the witness in question was properly rejected.

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Mr. Serjeant *Bosanquet* in support of his rule.—The first question is, whether the *prescriptive* exercise of the right claimed by the plaintiff to take the second best fish out of every boat-load landed at *Sennen Cove*, is supported by the evidence adduced in support of the claim. It was proved, at the trial, that the soil of the cove, as well as the property surrounding it, with the

(a) 1 Doug. 374.

(b) 1 Eagle & Younge's Tithe Cases, 306; S. C. 1 Gwill. 360.

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exception of the part on which the capstan stood, belonged to Mr. *Williams*. But it has been said, that, as the plaintiff and his ancestors had, from time immemorial, kept the capstan in repair and supplied the rope, there was a sufficient consideration to support the plaintiff's claim for toll, whether they had been used by the fishermen frequenting the cove, or not.

There is a manifest distinction between *toll thorough* and *toll traverse*; and although, to support the former, it is necessary to shew a consideration, it must be admitted that, for the latter, it is not. If it had been proved that the whole of the cove, and the lands surrounding it, had at one time belonged to the plaintiff's ancestors, this case might have fallen within the principle established in Lord *Pelham v. Pickersgill*. But there, it was stated upon the face of the record, that the highway and the toll were coeval, so that it might be presumed that the grant of the highway was the consideration for the toll; but here, nothing of that kind appeared, and the general principle recognized in that case is, that, in order to support a claim of toll, there must be a *quid pro quo*. Although, therefore, toll traverse may be claimed after the perception of the toll has been severed from the ownership of the land in respect of which it originally accrued, they must still be proved to have been once united. The toll claimed by the plaintiff in this case is in the nature of a toll thorough, as the plaintiff is the mere owner of the capstan and rope, and claims nothing in the soil. Toll thorough cannot be by grant or prescription; neither can it be supported unless some consideration be shewn. A person cannot prescribe to have toll thorough for passing through a vill in a place which is not the high street. This was laid down by Mr. Justice *Thorpe* (a), who said, "that toll thorough is properly where a toll is taken of men for

(a) 22 Assise, 58.

passing through a vill in the high street; and that a man cannot prescribe for such tolls, because it is against the common law and common right, for that the high street is common to all; but that toll traverse is where a man pays certain toll for passing over the soil of another in a way not a high street." Now, if this latter definition be accurate, the plaintiff, in order to support his claim for toll, should have shewn that his ancestors were once owners of the soil, and at a time when there was no highway over it. In *Smith v. Shepherd* (a), in an action for trespass for taking the plaintiff's sheep, the defendant justified, as servant of the lord of a manor, *by prescription, to take twopence for every twenty sheep passing per et trans the vill: and, if it was denied upon request, to detain one sheep of every twenty till payment: upon demurrer, it was adjudged, that the prescription was not good to take toll for passing in via regia, for that the inheritance of every man for passing in the King's highway is precedent to all prescriptions; but that, if a party shews cause for the toll, as, if he is bound to repair a bridge, or causeway, &c., this would be good; but that no such cause was shewn there; and that it is clear that a man may prescribe for toll-traverse, because it is a passage over his own freehold; but not so for toll-thorough. In the Mayor of Nottingham v. Lambert, Lord Chief Justice Willes said (b): "The case of *Smith v. Shepherd*, as it is reported in *Croke Elizabeth*, is very imperfectly stated; but, if that report deserve any credit, the Judges there were very much divided, and they did not give any final judgment on this point; and, as the case is reported in *Moor* (c), and much better than in *Croke*, it is an express authority against this toll; for it is there said, that this toll which was insisted on by the defendant in his plea was adjudged to be bad, for that a man cannot prescribe to have toll for passing in the King's*

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(a) *Moor*, 574; S. C. Cro. Eliz. 710. (b) Willes, 115. (c) Page 574.

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highway, for that it is the inheritance for every man to pass on the King's highway, which is prior to all prescriptions; and that, therefore, if a man will plead such a prescription, he must shew a reasonable cause for its commencement, which is not to be presumed." In *Warren v. Prideaux* (a), a prescription to have a bushel of salt of every ship that came laden with salt within a certain port, in consideration of maintaining the quay, and keeping a bushel to measure the salt, was held to be ill; and Lord Chief Justice Hale there said: "The prescription was not for a port, but a wharf. If any man will prescribe for a toll upon the sea, he must allege a good consideration, because, by *Magna Charta*, and other statutes, every one hath a liberty to go and come upon the sea without impediment." Mr. Justice Wilde said: "This custom or prescription is laid, to have a bushel of salt of every ship that comes within the port. If a ship be driven in by stress of weather, and goes out again the first opportunity that presents, shall that ship pay?" That case bears most materially on the present. There, toll was demanded in consideration of the claimant's maintaining the quay and keeping the bushel. Here, the plaintiff's claim is founded on his repairing the capstan and supplying the rope for the use of those who may choose to avail themselves of them. If even the defendant had used the capstan and rope, it would not be a sufficient consideration; it is clear, therefore, that toll could not be demanded from those who did not use them; for no person can claim a right to take toll from one who does not derive some benefit from that for which the toll is demanded, or the prescription for which is not founded on a meritorious consideration. In *Haspurt v. Wills* (b), the plaintiff alleged in his declaration, that the city of *Norwich* had a common wharf and crane, and a custom that all goods brought down the

(a) 1 Mod. 104; S. C. 2 Lev. 96.

(b) 1 Mod. 48.

river and *passing by* should pay a certain duty for wharfage and craneage—it was held to be a bad custom; for that, it being a *toll thorough*, it could not be claimed without shewing a consideration. In *Truman v. Walgham* (a), a prescription for toll for passing through the streets of *Gainsborough*, in consideration of repairing divers streets there, was held ill, because it did not say that the party repaired *all* the streets there; and the plaintiff might, for any thing that appeared to the contrary, be passing through a street which the claimant did not repair; and the Court there said, that “ Courts are exceeding careful and jealous of these claims of right to levy money upon the subject; these tolls began and were established by the power of great men.”

In *Colton v. Smith*, the prescription was for toll of all goods landed within the manor, in consideration of repairing a wharf within it; every one that paid had the benefit of the wharf; and if goods were landed elsewhere within the manor, they must have been landed upon the private property of the lord. In the *Mayor of Yarmouth v. Eaton*, the plaintiff set out that he had a right, by prescription, to port duties, and the consideration was self-evident, *viz.* the benefit to the subject; and the port might never require to be repaired. In *Lord Pelham v. Pickersgill*, the plaintiff shewed that the soil and the tolls were, before the time of legal memory, in the same hands; whence the Court presumed that the soil was originally granted to the public in consideration of the tolls. And, in *Lord Pelham v. Haigne* (b), which was an action on the same right as that claimed in *Lord Pelham v. Pickersgill*, although two additional facts were stated in the verdict in the latter case which did not appear in the former, *viz.* that it was an immemorial highway, and that the bridge had been immemorially repaired by the county; still, the

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(a) 2 Wils. 296.

(b) 1 Term Rep. 667, n.

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Court of *Common Pleas* determined against the toll. All these cases prove, that, in order to sustain a toll thorough, it must be shewn to be demanded in respect of some benefit accruing to the party charged. In the case of a toll traverse, it is incumbent on the claimant to shew that the soil in respect of which the toll is claimed originally belonged to the owner of the toll. In the case of the Mayor of *Nottingham v. Lambert*, it was held that a prescription to take a toll for passing on an ancient navigable river through the plaintiff's manor, was bad in law; and Lord Chief Justice *Willes* there said (a): "It has been holden several times, and by the best authorities, that toll thorough cannot be supported without a consideration, but toll traverse may, because it in itself implies a consideration. In the Book of Assize (b) it is expressly laid down as a rule, that toll thorough is against common law and common right, and cannot be supported by usage. It is so likewise holden in *Keilway* (c), that such toll is not allowable without some particular consideration. It is said, in 1 *Leonard* (d), that the King cannot grant toll thorough for passing through a highway, for that it is an oppression to the people, for that every highway shall be common to every one. In 1 *Ventris* (e) in the case of the City of *Norwich*, such custom was holden to be illegal and unreasonable, unless for such vessels as unloaded at the quay there. In several books it is called *malum tolmetum*, or an outrageous toll, and an oppression on all the subjects of *England*; which sorts of tolls are condemned in *Magna Charta*, c. 30, and by the statute *Westminster* 1, c. 31 (f), where it is said, that, if any one take outrageous tolls, contrary to the common law of the realm, if it be in a vill of the King's, the King shall take away the franchise." In the late case of *Richards*

(a) *Willes*, 114.(b) 22 *Edw.* 3, 58.

(c) Pages 148, 149.

(d) Page 232.

(e) Page 71.

(f) 3 *Edw.* 1.

v. Bennett, Lord Chief Justice *Abbott* said (a): "The plea alleges, not only that the manor has existed from time immemorial, but also that the town has, from time immemorial, been part of the manor. It is, therefore, to be presumed, that, before the time of legal memory, the site of the town belonged to the lord. It is also alleged, that the toll has been paid immemorially. We may, therefore, fairly infer that the toll was originally granted to the lord, in consideration of his consenting that the soil of the manor should be laid out in the streets of the town."

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The testimony of the witness offered at the trial, on the part of the defendant, to prove the non-existence of the custom set up by the plaintiff, was improperly rejected. The plaintiff's claim was founded on a private right accruing to him by prescription, and not by virtue of a custom affecting the public at large. The defendant merely contended that the plaintiff had no right to demand the toll, and he had a right to shew that such toll had not invariably been demanded, and that the plaintiff had not at all times repaired the capstan or supplied the rope. The witness was excluded, not because he denied the usage, but because he stated that he was a fisherman, and in the habit of frequenting the cove. His testimony ought, from necessity, to have been admitted; for it was impossible for any one to speak to the usage with respect to the capstan and rope, other than such persons as were in the habit of using the cove. The plaintiff insisted that he was entitled to toll, whether the capstan and rope were used or not, and the Jury have so found. The verdict, therefore, cannot be supported.

Cur. adv. vult.

Lord Chief Justice *BEST* now delivered the judgment of the Court as follows:—

The plaintiff claimed the second best fish out of every

(a) 1 Barn. & Cress. 231.

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boat-load of fish that was landed in *Sennen Cove*. This claim was founded on a custom, under which the plaintiff and his ancestors had maintained a capstan and rope, which were sometimes used by the fishermen for the purpose of drawing up their boats to a place out of the reach of the tide. The plaintiff insisted, and the Jury found, that, whether the capstan and rope were used or not, the plaintiff was entitled to this toll. In certain states of the tide, and in tempestuous weather, boats could not be drawn up from the sea with safety to the crews, without the assistance of the capstan and rope. *Sennen Cove*, with the exception of the small part on which the capstan stood, was the soil of a Mr. *Williams*. But it appeared that the part on which the capstan stood had been in the possession of the plaintiff and his ancestors (who were the owners of a farm in the neighbourhood, called *Penrose* farm) for as long a period as the oldest witnesses could recollect; and that this part was separated from the rest of the cove by a wall that surrounded the capstan; but the space between this wall and the sea, over which the boats were drawn by the capstan, was left entirely open, and was the property of the person to whom the rest of the cove belonged. It also appeared, that *Sennen Cove* was rendered a proper place for the landing of boats, by human labour; and that rocks had been removed, and a track made for the hauling up boats to a place above the reach of the tide.

It has been objected, that there was no consideration for the custom of taking tolls from the fishermen who did not make use of the capstan to draw up their boats from the sea. Although it is not always necessary to use the capstan, yet, if boats in certain seasons could not safely approach this place, unless they were certain of having the assistance of the capstan to draw them out of the surf, we think that the keeping of the capstan ready for the use of the fishermen who resort to this cove, is a sufficient consideration for a toll to be paid by

them, whether they actually use it or not. No boat could put to sea with any thing like safety, if proper means were not provided to draw them out of the breakers, in case a strong wind should set in towards the land. Although the fishermen may not always use the capstan, it is of advantage to them; nay, it is essential to their safety, that it should be kept ready for them. The keeping of a capstan for such a purpose is a sufficient consideration for a reasonable toll.

There is no doubt that the King may at this time establish a reasonable toll for the performance of any duty that the public convenience or safety requires should be performed. The creation of a toll is only a mode of paying for a public service. The power of creating tolls depends upon the necessity of the service, and the reasonableness of the toll taken for it. If the service be not of public advantage, or the toll be unreasonable, it cannot be supported. But it is impossible to contend that this capstan and rope are not of the greatest importance to these fishermen; and it was not suggested, either at the trial, or in the argument here, that the toll demanded was excessive or unreasonable. If the plaintiff had purchased this land a year ago, had made a landing-place in this cove, had built a capstan, provided a proper rope, and undertaken to keep the capstan and rope in a proper state at all times, for the use of the fishermen, it would have been a sufficient consideration for the grant by the Crown of such a toll as the Jury have found was due to the plaintiff by virtue of a custom.

Now, it is well known that many tolls are good under a custom, of which a good grant could not be made at the present time. A custom which is proved to have existed immemorially, will be good, if it be of such a nature that it is possible that it can have had a good beginning. Although it be such as to confer what the King cannot now grant, yet, if it be not contrary to reason, it may be sup-

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ported; for it might have had its commencement from an act of the Legislature. Custom is a local law which supersedes the general law, *Littleton* gives us the maxim, *Consuetudo, ex certâ causâ rationabili usitatâ, privat communem legem* (a). The custom on which the plaintiff rests his claim appears to us to be reasonable—convenient even to those who resist its establishment—advantageous to the public, by encouraging a valuable fishery—and highly beneficial, as tending to the preservation of human life. Therefore, we have no doubt that this is a valid custom. In the case of the Earl of *Falmouth* v. *Penrose* (b), the validity of the custom was never disputed. The objection there taken was, that the pleadings were not applicable to the case proved. At the trial of this cause, it was proposed to examine, as a witness for the defendant, to disprove the custom, a man who admitted that he was then a fisherman frequenting *Sennen Cove*. My learned brother *Burrough* rejected this person's evidence, and we are of opinion that he was not a competent witness. Although the declaration did not set out the custom, yet, as the plaintiff claimed his right upon a custom, and the defence consisted in a denial of it, the judgment in this case, with evidence shewing that the question at the trial was, whether there was a custom or not, would be admissible, should an action be brought against the witness for landing fish in *Sennen Cove* without paying the toll. Whenever customs are set up, judgments in causes between other parties are admissible in evidence to prove or disprove such customs. The witness had, therefore, a direct and immediate interest to obtain a verdict for the defendant, as he might use such verdict to protect himself, in case an action should be brought against him for the non-payment of tolls due on the landing of fish by himself. This point is expressly decided by the case of *The Com-*

(a) Litt. s. 169.

(b) 6 Barn. & Cress. 385.

pany of *Carpenters of Shrewsbury v. Hayward* (a), where witnesses were rejected, who were called to prove that they had worked as carpenters in *Shrewsbury*, though not free of the company; and Lord *Mansfield* said: "If the company had failed in establishing the custom, the witnesses would have been discharged from actions to which they were liable for the breach of it." We do not mean to say that an intention to bring fish into *Sennen Cove* immediately after the cause was tried, or the having brought fish there without paying the tolls, so long ago as that those who brought them were protected by the statute of limitations, would render witnesses incompetent. The former have no interest, and the interest of the latter, like that of an heir-at-law, is future and contingent. If such persons were not competent witnesses, none who had any right knowledge upon the subject would be received, who could disprove a toll thorough or a toll traverse. We put the incompetency of the witness upon the ground of his immediate liability to an action, in the event of the verdict being for the plaintiff; and of his being relieved from that liability by a verdict for the defendant.

We are, therefore, of opinion that the rule for a new trial must be—

Discharged.

(a) 1 Doug. 374.

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Nov. 28th.

WEBB, Demandant; LANE, Tenant.

In a count in a writ of right, blanks were left for the name of the demandant's attorney, and for the word "esplees," and the count was indorsed in the name of an attorney in the country, without reference to his agent in London. The tenant having signed judgment of *non pros*—The Court held it to be irregular, and set it aside; with leave to the demandant to amend his count, on payment of costs.

THIS was a writ of right. The count was as follows: *John Webb*, by — his attorney, demands against *William Lane*, one thousand acres of land, in the parish of *Brixham*, in the county of *Devon*, which he claims to be his right and inheritance, and of which he is seised in his demesne as of fee and right, within thirty years last past, by taking the — and profits thereof to the value of 1,000*l.*; and that such is his right, he offers &c. The back of the count was indorsed, "*Herbert Mends Gibson*, attorney, *Pymouth*;" but, as it did not appear who his agent in *London* was, the tenant signed judgment of *non pros*.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* that this judgment might be set aside for irregularity, that the tenant might pay the demandant the costs of the application, and that the latter might have leave to amend his count.

Mr. Serjeant *Taddy* now shewed cause, and submitted that, as the name of the demandant's attorney, as well as the word "esplees," were omitted in the count, the tenant had a right to treat it as a nullity. In *Charwood v. Morgan* (a), the Court refused to allow the demandant to amend the mistake of a christian name in the count, although an affidavit accounting for the mistake was produced. Sir *James Mansfield* there said: "Had not this been a proceeding by writ of right, the Court would have been willing to amend the mistake which has arisen, and into which the most careful pleader might have fallen. But, considering the nature of this proceeding, how much it has always been discouraged, how much tenants have been permitted

(a) 1 New Rep. 64.

to avail themselves of every advantage to defeat the claims of demandants, I am of opinion that, unless some precedent for such an amendment can be produced, the soundest exercise of our discretion will be, not to allow the amendment." And Mr. Justice *Heath* said (a): "In *Dumday v. Hughes* (b), we thought that writs of right ought not to be encouraged, and that the least slip was fatal to the demandant." Besides, here, the name of the *London* agent was not indorsed on the back of the count, and the tenant was not bound to send down to *Plymouth*, for the purpose of delivering a plea to the demandant's attorney there.

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But the Court said, that the tenant either ought to have demurred to the count, or moved to set it aside for irregularity; and that the mere omission of the indorsement of the name of the demandant's attorney, and of the word "*esplees*," did not constitute such an irregularity as to entitle the tenant to sign judgment. The rule to set it aside must therefore be made absolute, and the demandant may amend his count, on payment of costs.

Rule absolute accordingly.

(a) 1 New Rep. 66.

(b) 3 Bos. & Pul. 453.

BEDDINGTON v. BEDDINGTON.

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A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, calling on the Sheriff of *Middlesex* to shew cause, why he should not return a writ of *scire facias*, which had been left with him by the plaintiff's attorney, and why he should not pay the plaintiff the costs of this application.

The plaintiff's attorney left a writ of *scire facias* with the Sheriff, and directed it to be returned *nihil*: the Sheriff refused to return the writ, until he had been

paid a fee, to which the attorney did not think him entitled; the plaintiff accordingly obtained a rule, calling on the Sheriff to shew cause why he should not return the writ, and pay the costs of the application. The Court, with a view to discourage the practice of ordering returns of *nihil*, discharged the rule without costs, and intimated an opinion that, in future, two *nihil*s should not be deemed equivalent to a *scire feci*.

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The motion was founded on an affidavit, which stated, that the plaintiff's attorney had left a writ of *scire facias* with the Sheriff, to be returned *nihil*; and that he would not return the writ, because the attorney had refused to pay the sum of six shillings and eight pence, which the attorney thought the Sheriff was not entitled to, it being more than the usual fee. The Sheriff immediately on being served with a copy of the rule returned the writ.

Mr. Serjeant *Russell* now showed cause against that part of the rule which called on the Sheriff to pay costs; and he referred to the case of *The King v. Jones (a)*, where it was held that a Sheriff is not liable to an attachment for not returning a writ, if not called upon *by a rule of Court* within six months after the expiration of his office; notwithstanding he was *requested* by the party to return it before the six months were expired; and the Court there said, "that the only way to call on a Sheriff to return a writ, is by a rule and process of the Court, and that if this mode of *desiring* a return of a writ were to be allowed, it would be productive of numberless questions, as to what should be deemed a calling on the Sheriff"—and here, as soon as the Sheriff had notice of the rule, he caused the writ to be returned.

Mr. Serjeant *Wilde*, in support of his rule, insisted, that, as the Sheriff had compelled the plaintiff to apply to the Court to cause him to return the writ, he was entitled to the costs of the application. The return of *nihil* had been indorsed upon the writ before the under-sheriff had demanded the fee in question; and the plaintiff's attorney informed him, that, if he did not return the writ, he would move the Court to compel him to do so. The Sheriff might have made a special return, if he had thought proper; but he had

(a) 2 Term Rep. 1.

no right to exact more than the usual fee, as the writ was left with him to be returned *nihil*.

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Lord Chief Justice BEST.—The greatest injustice is frequently done, by parties directing returns of *nihil* to be made by a Sheriff to writs of *scire facias*. The defendant always ought to have notice that such writ is sued out against him, and that it is lodged in the Sheriff's office. It is a mere mockery to issue such a writ, and direct the Sheriff to return *nihil*, by which the defendant is burthened with an unnecessary expense. We cannot say that the under-sheriff attempted to exact a fee for which there was no pretence, or to which he was not legally entitled; still, it seems that the demand was improperly made, as the Sheriff returned the writ without renewing his demand. If the plaintiff had not directed the sheriff to return *nihil*, we would have ordered him to pay the costs of this application.

Mr. Justice PARK.—The practice of directing a Sheriff to return *nihil* to a writ of *scire facias*, without giving any notice to the defendant or his bail, appears to be most outrageous, and ought not to be countenanced by the Court in future.

Mr. Justice BURROUGH.—I trust that it will not be long before the practice, that two *nihil*s shall be deemed equivalent to a *scire feci*, will be abolished.

Mr. Justice GASELEE.—The greatest inconvenience and hardship are imposed on defendants and their bail, where a plaintiff directs a Sheriff to return *nihil* to a writ of *scire facias*, without giving them any information that such writ is lodged in the office, and I trust that this practice will be noticed by the commissioners in their report, and that

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they will point out a remedy, so as to obviate such practice in future.

Rule discharged, without costs.

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ELWORTHY and two Others v. THOMAS MAUNDER.

The defendant was arrested on an affidavit, which stated, that by a memorandum in writing, bearing date the 11th August, and signed by the defendant, he undertook to be answerable to the creditors of certain persons using the style and firm of *W. M. and J. M.*, for the amount of the debts of such creditors, on their (the creditors') undertaking not to issue a commission of bankrupt, or sue out process, against *W. M. and J. M.*, on or before the 16th August then next; that the plaintiffs were creditors of *W. M. and J. M.*; and that the latter were indebted to the former, in the sum of 1,000*l.*; and that the plaintiffs had not, nor, as the deponent was informed and believed, had any of the other creditors caused a commission of bankrupt, or any process, to be sued out against *W. M. and J. M.* before the 16th August:—Held insufficient, on the ground that an undertaking by all the creditors not to sue out a commission or process, was a condition precedent, and ought to have been alleged in the affidavit.

THE defendant was held to bail on the following affidavit of debt:—" *William Elworthy*, of *Wellington*, in the county of *Somerset*, woollen manufacturer (one of the plaintiffs), maketh oath and saith, that, by a memorandum in writing, bearing date the 11th August, 1828, and signed by *Thomas Maunder*, of *Crediton*, in the county of *Devon*, tanner, (the defendant), the said *Thomas Maunder* did undertake and agree to be answerable to the creditors of certain persons using the style and firm of *William Maunder* and *James Maunder*, for the amount of the debts of such creditors, on their, the said creditors, undertaking not to issue a commission of bankrupt, or sue out process against them the said *William Maunder* and *James Maunder*, on or before *Saturday*, the 16th day of *August* (then) instant; and the deponent further saith, that he, and one *Thomas Elworthy* the elder, and one *Thomas Elworthy* the younger, trading together as co-partners, and using the style or firm of Messrs. *Thomas Elworthy & Co.*, were, and now are, creditors of the said *William Maunder* and *James Maunder*; and that they, the said *William Maunder* and *James Maunder*, were, on the 11th August, instant, and still are, indebted to this deponent, and the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the

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younger, in a certain large sum of money, to wit, the sum of 1,000*l.* and upwards, that is to say, the sum of 300*l.* on a bill of exchange drawn by the said *William Maunder* and *James Maunder*, upon one *Joseph Lambert*, and payable to the order of the said Messrs. *Thomas Elworthy & Co.*, at a certain day now past; and in the further sum of 700*l.* and upwards, for goods sold and delivered by this deponent, and the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the younger, to the said *William Maunder* and *James Maunder*, at their request: and this deponent further saith, that he, confiding in the said undertaking and agreement of the said *Thomas Maunder*, did not, nor hath the said *Thomas Elworthy* the elder, and the said *Thomas Elworthy* the younger, or either of them, nor have nor hath (as this deponent is informed and believes) any or either of the other creditors of the said *William Maunder* and *James Maunder*, caused a commission of bankrupt to be issued, or sued out any writ or other process, against them, the said *William Maunder* and *James Maunder*, or either of them, on or before the said 16th *August* (then) instant:—yet, that the said *Thomas Maunder*, (although often requested so to do), hath not, nor have the said *William Maunder* and *James Maunder*, or either of them, as yet paid the said sum of 1,000*l.* and upwards, or any part thereof, to this deponent, or to the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the younger, or either of them; but that the same still remains wholly due and unpaid:—and this deponent further saith, that he, the said *Thomas Maunder*, is justly and truly indebted to this deponent, and the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the younger, in the said sum of 1,000*l.* and upwards, upon and by virtue of the said memorandum, and the undertaking and agreement of the said *Thomas Maunder* therein mentioned: and this deponent astly saith, that no offer hath been

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made to this deponent, or to the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the younger, or either of them, by the said *Thomas Maunder*, or by the said *William Maunder*, or either of them, to pay the said sum of 1,000*l.* and upwards, or any part thereof, in any note or notes of the Governor and Company of the Bank of *England*, expressed to be payable on demand."

Mr. Serjeant *Bompas* (in the absence of Mr. Serjeant *Wilde*), on a former day in this Term, obtained a rule *nisi*, that the bail-bond entered into by the defendant on his arrest in this action, might be delivered up to the defendant to be cancelled, on his entering a common appearance; and that the plaintiffs should pay the defendant the costs of this application; and that, in the mean time, all further proceedings in the cause should be stayed; on the grounds, that the consideration for the defendant's undertaking was not stated with sufficient certainty in the affidavit, nor was there any mutuality apparent upon the face of the agreement to bind the defendant, as all the creditors of his sons were not specifically named, neither did it appear that they had signed the agreement under which the defendant was arrested: that the only consideration for the defendant's promise was the undertaking by the whole of the creditors not to issue a commission of bankruptcy, or sue out process, against his sons, for a certain time; and such promise can, at all events, only enure to the benefit of those creditors who gave that undertaking at the time:—that the agreement must be construed altogether, and, if so, it contains only a conditional promise to pay the debts of *William* and *James Maunder*, if they were not forth-coming on a given day. It does not even appear that the plaintiffs were parties to the agreement, or that they were present at the time it was entered into; and the defendant's liability depended on a condition precedent, namely an undertaking by all the creditors of his

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sons, not to sue out a commission against them before the 16th August; and there is no averment that any such undertaking had been given, or that all the creditors had abstained from suing out a commission before that day. There is not even a sufficient consideration expressed in the agreement for the defendant's undertaking, to support an action; for in *Phillippe v. Bateman* (a), the defendant, on occasion of there being a great run upon a banking-house, went to the bank and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.* at which the holders, then present, were satisfied, and said they would take no more money than was necessary; and would keep the rest of their notes till they got again into currency; and afterwards the defendant signed the following written paper: "I do hereby authorize G. B. to assure the inhabitants of *Pembroke*, and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the *Milford* bank, as far as the sum of 30,000*l.* will extend to pay:" The bank having afterwards stopped payment, it was held, that the defendant was not liable upon this undertaking to an action by an individual holder, who had taken the notes after notice of such undertaking, but before the stoppage: and in *Durnford v. Manser* (b), and affidavit of debt for money lent, and for goods sold and delivered, and for work and labour, was held to be irregular, in omitting to state that it was "at the instance and request of the defendant," although it alleged that it was "to and for his use, and on his behalf." And the Court there said, that "an affidavit which is to operate in restraint of the liberty of a party, ought to use unequivocal language."

Mr. Serjeant Jones and Mr. Serjeant Stephen now shew-

(a) 16 East, 356.

(b) 5 Mau. & Selw. 446.

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ed cause.—The affidavit under which the defendant was arrested is framed on a memorandum or agreement in writing, by which he undertook to be answerable to the creditors of his two sons for the amount of the debts of such creditors. It is averred, that the plaintiffs were creditors of the sons, and that they, confiding in the agreement made by the defendant, did not, nor had any of the other creditors, to the belief of the deponent, caused a commission to be issued, or a writ or any other process to be sued out against the sons. The forbearance to do so, raises a sufficient consideration for the defendant's promise, and the agreement was made by the defendant with the body of his sons' creditors, of whom the plaintiffs formed part. Although it is not averred that the plaintiffs were present at the time of signing the agreement, yet it was unnecessary, as it is averred that they forbore to sue out a commission or process; and a subsequent assent is sufficient to ratify a previous contract. If an agent make a contract, and his principal afterwards ratify it, he is bound by such contract. So, if a person stipulate with a number of men, that, if they will forbear to do a certain act, he will pay them a given sum, and they forbear in consequence, it raises a sufficient consideration for such a stipulation. In the case of an advertisement, by which a party agrees to pay a certain sum on the recovery of a thing lost, an action may be maintained by the finder for the amount of the reward offered; and there, the promise is far more indefinite than in this case, as it is sworn that the defendant undertook to be answerable to the creditors of his sons, and the plaintiffs have connected themselves with those creditors by a distinct and substantive allegation.

Mr. Serjeant *Wilde*, in support of the rule.—The affidavit is clearly defective. The agreement is made with the whole body of the creditors of the defendant's sons, and there is no allegation that an undertaking was given

by all of them not to sue out a commission or process against the sons, and that was a condition precedent to the defendant's liability. The Court cannot assume that the plaintiffs were present at the time the agreement was signed, and it does not even appear that they were parties to it. The liability of the defendant must depend on an assent or *undertaking by all the creditors* not to take certain proceedings against the defendant's sons, which does not appear on the face of the affidavit to have been done, and, in point of fact, no such assent or undertaking was ever given. In *Macpherson v. Lovie* (a), where an affidavit of debt stated that the defendant was indebted to the plaintiff, upon a written agreement to marry the plaintiff at a time specified, or pay her 1,000*l.*; and that he had not done either, although the time had elapsed, and the plaintiff was ready and willing to marry the defendant, and requested him to marry her; it was held, that this was insufficient; and the Court said, that "the principle to be collected from all the decisions on the point is, that the Court can take nothing by intendment in an affidavit of debt; and that a party cannot be arrested and deprived of his liberty, unless the affidavit discloses a cause of action against him. In the present case no cause of action is shewn, no consideration for the defendant's promise being stated." That case appears to be in point, and in favour of the application.

Lord Chief Justice BEST.—I am of opinion that this affidavit is insufficient, but I do not say whether the action may not be maintained, because it seems that the Court of *King's Bench* have, in effect, decided, that it may, in the late case of *Payne v. Wilson* (b), where, in *assumpsit*, the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, *would consent* to sus-

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(a) 1 Barn & Cress. 108; S. C. 2 Dow. & Ryl. 69.

(b) 7 Barn. & Cress. 423.

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pend proceedings against *A.* on a *cognovit*, the defendant promised to pay 30*l.* on account of the debt (for which the *cognovit* was given), on the 1st *April* then next; and it was averred, that the plaintiff did suspend proceedings on the *cognovit*. The plaintiff, at the trial, proved the following agreement in writing: "The plaintiff *having, at my request, consented* to suspend proceedings against *A.*, I do hereby, in consideration thereof, personally promise to pay 30*l.* on account of the debt, on the 1st day of *April*:"—it was held, that, as the request must have preceded the consent to suspend proceedings, the contract might be declared on as an executory contract, and consequently, that there was not any variance; and that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, until the 1st *April*; and that, after verdict, the averment that "the plaintiff had suspended proceedings" was sufficient without specifying for what period. I agree that an undertaking to forbear to sue out a commission or process against the defendant's sons, on or before a given day, is sufficient to raise a consideration for his promise; and although the plaintiffs have stated that *they* forbore to issue a commission or sue out process against the sons, yet it is not alleged that *all* the creditors undertook not to sue out a commission or sue within the stipulated time, which is a condition precedent to any liability to be incurred by the defendant.

Mr. Justice PARK.—I am also of opinion that the affidavit is defective, the plaintiffs not having averred that *all* the creditors had undertaken not to issue a commission of bankrupt, or sue out process against the defendant's sons, on or before the day mentioned in the agreement. Indeed, the plaintiffs could not have so sworn, unless *all* the creditors were present at the time the agreement was made. The defendant undertook to be answerable to the whole

of the creditors, on their undertaking not to do certain acts, and such undertaking appears to me to be a condition precedent to the plaintiff's right to maintain this action.

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Mr. Justice BURROUGH.—There is no allegation of an undertaking by *all* the creditors not to sue out a commission or process before the 16th August, and, if any of them had done so, the defendant would not be liable on his undertaking. Besides, the person who made the affidavit only swears, that neither he nor his partners, nor any of the other creditors, as the deponent was informed and believes, caused a commission, or writ, or other process to be sued out:—he should have gone further, and stated explicitly that all the creditors had undertaken not to do so.

Mr. Justice GASLIER.—There should have been a positive allegation, that all the creditors of the defendant's sons had undertaken not to issue a commission, or to sue them, in order to render the defendant liable on his undertaking to be answerable for their debts. This fact the party who made the affidavit could not swear of his own belief, and, therefore, the defendant is entitled to have the bail-bond delivered up to him; but, as he was not wantonly or vexatiously held to bail, the rule must be—

Absolute, without costs.

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Devise to trustees in trust for devisor's eldest son, *J. H. L.* for life:—remainder to trustees to preserve contingent remainders:—remainder to the use of the *second, third, fourth, fifth, and all and every other the son and sons of the body of J. H. L.* severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age or priority of birth, in tail male:—remainder to the *first, second, third, fourth, fifth and other daughters of J. H. L.* severally and successively, in tail general:—remainder to devisor's eldest daughter, *M. S. L.* for life:—remainder to her *first, second, third, fourth, fifth, and other daughters* successively, in tail general:—remainder to devisor's *second and other daughters* successively, with like remainders in tail general to their respective issue:—remainder to devisor's sister in fee:—*Held*, that the *first or eldest son* of the devisor's son *J. H. L.* took an estate in tail male, under the devise, expectant on the death of his father *J. H. L.*, although he was not named or enumerated in the will.

J. H. LANGSTON v. Sir C. M. POLE, Bart., and Others.

THE following case was sent for the opinion of this Court, in pursuance of an order of his Honour the Master of the Rolls:—

“ *John Langston, Esq.*, was, at the time of making his will hereinafter mentioned, and at his death, seised in fee simple of divers manors, messuages, lands, tenements, and hereditaments, situate in the counties of *Oxford* and *Middlesex*, and duly made and published his last will and testament in writing, bearing date the 28th of *July, 1801*, which was executed and attested in the manner by law required to pass freehold estates by devise; and he thereby gave and devised all his manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the several counties of *Oxford* and *Middlesex*, or elsewhere in *England* (except his shares in the *New River Company*), unto *John Pollexfen Bastard, Esq.*, *John Williams Hope, Esq.*, and *Charles Morice Pole, Esq.*, (now *Sir Charles Morice Pole, Bart.*), their heirs and assigns, to the uses after-mentioned—(that is to say)—to the use of the said testator's son, (the plaintiff), *James Haughton Langston*, for and during the term of his natural life, without impeachment of waste, and, from and after the determination of that estate, by forfeiture or otherwise, in his lifetime, to the use of certain trustees therein named, and their heirs, during the life of the said plaintiff—in trust, by the usual ways and means, to preserve the contingent uses and estates thereafter limited; with remainder to the use of the *second, third, fourth, fifth, and all and every other the son and sons* of the body of the said plaintiff lawfully to be begotten, severally, successively, and in remainder, one after another, as they, and every of them, should

be in seniority of age or priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body, to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; with remainder to the use of the said testator's *second* and *other* sons, *successively*, and in tail male; with remainder to the use of certain other trustees therein named, their executors, administrators, and assigns, for the term of five hundred years—upon the trusts, and for the intents and purposes thereafter mentioned; with remainder to the use of the *first, second, third, fourth, fifth, and all and every other the daughter and daughters* of the body of the said plaintiff lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and, for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns, for and during the term of *ninety-nine* years, upon the trusts, and for the intents and purposes thereafter mentioned; with remainder to the use of the said testator's eldest daughter, *Maria Sarah Langston*, and her assigns, for and during the term of her natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture, in her life-time, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of her the said testator's said daughter, in trust, by the usual ways and means, to preserve the contingent uses and estates thereafter limited; with remainder to the use of the *first, second, third, fourth, fifth, and all*

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and every other the son and sons of the body of her the said testator's said daughter, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, to be always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; and, for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns, for the term of six hundred years, upon the trusts and for the intents and purposes thereafter mentioned; with remainder to the use of the *first, second, third, fourth, fifth, and all and every other the daughter and daughters* of the body of her the said testator's said daughter, *Maria Sarah Langston*, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred and to take before the younger of such daughter and daughters and the heirs of her and their body and bodies issuing; and, for default of such issue, to the use of the said testator's daughter, *Elizabeth Catharine Langston* (now *Elizabeth Catharine Barter*), and her assigns, for her life; and, from and after the determination of that estate, by forfeiture or otherwise, in her life-time, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of his the said testator's said daughter, in trust to preserve the contingent uses and estates thereafter limited; with like remainders to the use of the sons of the said *Elizabeth Catharine Langston* (now *Elizabeth Catharine Barter*), and their heirs male; and, for default of such

issue, to other trustees therein named, their executors, administrators, and assigns, for the term of seven hundred years; upon certain trusts thereafter mentioned; with like remainders to the use of the daughters of the said *Elisabeth Catherine Langston*, (now *Elisabeth Catherine Barter*), and the heirs of their bodies: and, for default of such issue, to the use of the said testator's daughter, *Caroline Langston*, and her assigns, for her life; and, from and after the determination of that estate, by forfeiture or otherwise, in her life-time, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of the said *Caroline Langston*, in trust to preserve the contingent uses and estates thereafter limited; and, from and after the decease of her the said *Caroline Langston*, to the use of her sons and their heirs male; and, for default of such issue, to the use of other trustees therein named, their executors, &c., for the term of eight hundred years, upon the trusts, and for the intents and purposes, thereafter mentioned; with like remainder to the use of the daughters of the said *Caroline Langston*, and the heirs of their bodies: and, for default of such issue, to the use of the said testator's daughter, *Agatha Sophia Maria Langston*, and her assigns, for her life; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of her the said testator's said daughter, *Agatha Maria Sophia Langston*, in trust to preserve the contingent uses and estates thereafter limited; with like remainder to the use of the sons of her the said testator's said daughter, *Agatha Maria Sophia Langston*, and their heirs male; and, for default of such issue, to the use of other trustees therein named, their executors, &c., for the term of nine hundred years, upon the trusts, and for the intents and purposes, thereafter mentioned; with like remainder to the use of the daughters of her the said testator's said daughter, *Agatha Maria Sophia Langston*,

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and the heirs of their bodies: and, for default of such issue, to the use of the said testator's daughter, *Henrietta Maria Langston*, and her assigns, for her life; and, from and immediately after the determination of that estate, by forfeiture or otherwise, in her life-time, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of her the said testator's said daughter, *Henrietta Maria Langston*, in trust, to preserve the contingent uses and estates thereafter limited; with like remainder to the use of the sons of her the said testator's said daughter, *Henrietta Maria Langston*, and their heirs male; with remainder to the use of other trustees therein named, their executors, administrators, and assigns, for the term of *one thousand* years, upon the trusts and for the intents and purposes thereafter mentioned; with like remainder to the use of the daughters of her the said testator's said daughter, *Henrietta Maria Langston*, and the heirs of their bodies; with remainder to the use of the said testator's sixth, and other daughters thereafter to be born, successively, in tail general; with remainder to the use of other trustees therein named, their executors, administrators, and assigns, for the term of *one thousand five hundred* years, upon the trusts, and to and for the intents and purposes, thereafter mentioned; with remainder to the use of the said testator's sister, *Sarah*, the wife of *Peter Casalet*, Esq., her heirs and assigns, for ever:—And the testator did by his said will declare, that as for and concerning the said term of *five hundred* years by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators, and assigns, upon trust, that, in case there should be *no son* of the body of the said plaintiff, *James Haughton Langston*, nor any future son of his the said testator's own body; or, there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daugh-

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ters of the body of his the said testator's said son, the said plaintiff, *James Haughton Langston*, then they the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the decease of his the said testator's said son, the said plaintiff, *James Haughton Langston*, and such failure of issue male of his body, and of his the said testator's own body as aforesaid, by mortgage, or sale, or other disposition of all or any part of the premises comprised in the said term of *five hundred years*, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters (*other than and besides an eldest or only daughter*) as thereafter mentioned; that is to say, in case there should be but one such daughter, not being an eldest or only daughter, the full sum of 20,000*l.* for the portion of such one daughter, to be paid to such one daughter, at the age of twenty-one years, or day of marriage, which should first happen after the commencement of the said term of five hundred years in possession; but if such only daughter should have attained such age, or be married, before such commencement, then to be paid to her immediately after such commencement:—and if there should be two or more such younger daughters, then the sum of 40,000*l.* for the portions of such two or more of them, and to be paid and divided unto or between and among them, or any one or more of them, and to be payable at such days or times, and in such parts, shares, and proportions, and subject to such provisoes, conditions, and limitations over (such limitations over to be for the benefit of some or one of them), as he the said plaintiff, *James Haughton Langston*, at any time or times during his life, by any writing or writings, with or without power of revocation and new appointment, sealed and delivered by him in the presence of and attested by two or more credible

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witnesses, or by his last will and testament in writing, or any codicil thereto, signed in the presence of and attested by three or more credible witnesses, should direct or appoint; and for want of such direction or appointment, to be paid to such two or more younger daughters, and to be shared and divided between and among them, and in equal parts, shares, and proportions, share and share alike. Then, after directing the times and mode of payment, it was provided, that if any such younger daughter should depart this life, *or become an eldest daughter, and as such become entitled in possession to the said manors and other hereditaments thereinbefore devised*, before she should attain her age of twenty-one years, or be married, or before such other time or times as should or might be appointed for the payment of her or their portion or portions as aforesaid, *the portion or sum of money provided for each such daughter or daughters so dying or becoming an eldest daughter, should from time to time go and accrue to the survivors or survivor, and others or other of the said younger daughters, and should be equally divided between such survivors or others of them (if more than one) share and share alike, and the same should be paid and payable at such respective days and times, and should go in the same manner to such surviving and other daughter and daughters as thereby provided and declared touching their original portion or portions: and in case of the death of any other or others of the said daughters, or if any other or others of them should become an eldest daughter, and entitled as aforesaid, before she or they should have attained such ages or times as aforesaid, then all and every such accruing or surviving share and shares should, from time to time, again be subject and liable to such further right, chance, contingency, or condition of accruer or survivorship to the survivors and survivor, and others and other of the said younger daughters, as thereinbefore declared touching her or their original portion or portions;*

provided, nevertheless, that if the said younger daughters should be reduced to one, there should not be raised for the portion of such one younger daughter, by reason of any such survivorship, any sum or sums that would in the whole exceed the principal sum of 20,000*l*. Then followed provisions for the maintenance and education of the younger daughters, out of the interest of the money to be raised, and a proviso for determining the said term of five hundred years on the satisfaction of the several trusts thereafter mentioned concerning the same. And as to, for, and concerning the said term of ninety-nine years thereinbefore limited to trustees, he, the said testator, thereby declared that the same term was limited unto them, their executors, administrators, and assigns, upon trust, that in case there should be no son or daughter of the body of him the said plaintiff, *James Haughton Langston*, nor any future son of the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their age or ages of twenty-one years, then, they, the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the decease of the said plaintiff, *James Haughton Langston*, and such failure of issue, as aforesaid, by mortgage or sale, or other disposition of all or any part of the hereditaments comprised in the said term of ninety-nine years, or by the rents and profits thereof, or by any other ways and means, levy and raise for the use and benefit of each of the said testator's youngest daughters, *Elizabeth Catherine Langston*, *Caroline Langston*, *Agatha Maria Sophia Langston*, and *Henrietta Maria Langston*, respectively, or such of them as should not from time to time be in the actual possession of, or entitled to, the said hereditaments, under and by virtue of the li-

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mitations contained in the said will, for and during the term of their respective natural lives, an annuity or yearly sum of 500*l.*, clear of all deductions, and should pay the same unto them, the said testator's said youngest daughters respectively, or their respective assigns, by equal half yearly payments, on the twenty-fifth day of *March*, and twenty-ninth day of *September*, in every year, and should make the first payment thereof on such of the said days as should next happen after the commencement of the said term of ninety-nine years in possession:—Provided further, that in case there should be no son or daughter of the body of her the said testator's said daughter, *Maria Sarah*, or there being any such son or sons, daughter or daughters, if all and every of such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and if the said testator's said youngest daughters, *Caroline*, *Agatha Maria Sophia*, and *Henrietta Maria*, or any of them, should be then living, then upon trust that they, the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the several deceases of the said plaintiff, *James Haughton Langston*, and the said testator's daughter, *Maria Sarah*, and failure of all such issue as aforesaid, by the ways and means aforesaid, levy and raise for the use and benefit of each of them the said testator's said three youngest daughters, *Caroline*, *Agatha Maria Sophia*, and *Henrietta Maria*, respectively, or such of them as should not from time to time be in the actual possession of or entitled to the said manors and other hereditaments, under and by virtue of the limitations contained in the said will, for and during the term of their respective natural lives, a yearly sum of 300*l.*, clear of all taxes and deductions whatsoever, over and above the said annuity or clear yearly sum of 500*l.* thereinbefore provided for each of them the said testator's said youngest

daughters, and should pay the same unto them the said testator's said three youngest daughters respectively, or their respective assigns, by equal half-yearly payments, on such days and times, and together with the said annuities or clear yearly sums of 500*l.* thereinbefore provided for each such youngest daughter, and in manner thereinbefore directed touching the said respective annuities of 500*l.*:— Provided further, that, *in case any of them his said youngest daughters, for whom annuities were thereinbefore provided, should become entitled in possession to the said manors and other hereditaments thereinbefore devised, by virtue of the limitations contained in the said will, then and in such case, and from thenceforth, the said annuities or clear yearly sums thereinbefore provided for such daughter or daughters respectively, so becoming entitled as aforesaid, should cease, determine, and be no longer paid or payable: Provided further, that after payment of the several annuities thereinbefore provided for his said youngest daughters, and all arrears thereof respectively, the residue and overplus of the rents and profits (if any) should be had and received by the person and persons respectively, who, for the time being, should be next entitled to the reversion or the remainder of the said premises immediately expectant on the determination of the said term of ninety-nine years, to and for her and their own use and benefit.*

The testator then proceeded to declare the trusts relating to the several terms of six hundred, seven hundred, eight hundred, nine hundred, and one thousand years, similar to those of the term of five hundred years, *viz.* for raising annuities and portions for the younger daughters of the testator's five daughters: “and as to, for, and concerning, the said term of one thousand five hundred years thereinbefore limited to trustees, he, the said testator, thereby declared that the said term was so limited unto them, their heirs and assigns, upon trust, that, in case there should be *no son* or daughter of the body or respect-

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ive bodies of the said plaintiff, *James Haughton Langston*, or of the said testator's then present daughters, or of any of them, nor any future son or daughter of the said testator's body, or, there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their respective age or ages of twenty-one years, then they the said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, within the space of twelve calendar months after the several deceases of the said plaintiff, and the said testator's said then present daughters, and failure of all such issue as last aforesaid, by mortgage or sale, or other disposition, of all or any part of the said premises to be comprised in the said term of one thousand five hundred years, or by the rents and profits thereof, or by any other ways or means, levy and raise the sum of 80,000*l.*, of lawful money of *Great Britain*, together with interest for the same from the commencement of the said term of one thousand five hundred years in possession, after the rate of 4*l.* by the year for each sum of 100*l.*, and should pay, apply, and dispose of the same in manner thereafter mentioned, (that is to say), one moiety thereof unto the testator's sister, *Mary Ann*, the wife of *George Arnold Arnold*, Esq., her executors, administrators, and assigns, and the other moiety thereof unto his nephew, *Haughton Farmer Okeover*, of *Okeover*, in the county of *Stafford*, Esq., his executors, administrators, and assigns:—and in the said will is contained a power or proviso enabling the said plaintiff *James Haughton Langston*, by any deed or deeds, or by his last will and testament in writing, or by any codicil thereto, to be by him signed, sealed, and published in the presence of, and attested by, three or more credible witnesses, to grant, limit, and appoint, any rent or annual sum, not exceeding in the whole

the clear yearly sum of 1000*l.*, to be issuing and payable out of all or any part of the manors, messuages, farms, lands, tenements, tithes, and hereditaments, thereinbefore devised, unto any woman or women he should marry or take to wife, for and during the life or lives of such woman or women respectively, for or in the nature of her or their jointure or jointures, and in bar, or without being in bar, of dower; such rent or annual sum to take effect from the death of him the said plaintiff, *James Haughton Langston*, and to be payable half-yearly or quarterly, on or at such days or times as he should think fit. And the said testator thereby also provided and directed, that it should be lawful for the said plaintiff, from time to time, during his natural life, in case there should be any child or children of his body lawfully begotten, *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of, and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses, *to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes, and hereditaments thereinbefore devised, with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.* for the portion or portions of any one, two, or more of the younger son or sons or daughter or daughters, of the body of him the said plaintiff lawfully to be begotten, born in his life-time, or within due time after his decease, to be paid and payable unto, and to vest in, such younger son or sons, daughter or daughters, respectively, at such time or times, and in such shares and proportions, with such clauses of survivorship, and in such manner, as he the said plaintiff should, by such deed or deeds, instrument or instruments in writing, or last will and testament,*

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to be executed and attested as aforesaid, direct, limit, and appoint; and also to charge the same premises, or any part thereof, with or for the payment of any sum or sums of money, yearly or otherwise, as he should think fit, for the maintenance of such younger son or sons, or daughter or daughters, from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions, after the rate of *4l. per cent. per annum*; and the more effectually to secure and enforce the raising and due payment of such principal sum or sums of money, not exceeding in the whole the said sum of 25,000*l.*, as the plaintiff should think fit and be entitled to charge as aforesaid, the testator thereby willed and declared, that it should be lawful for the plaintiff, by the same, or by any such like deed or deeds, instrument or instruments in writing, to be so sealed and delivered as aforesaid, or by such his last will and testament, to be so signed, sealed, and published, as aforesaid, to limit and appoint, by way of demise or mortgage, the hereditaments and premises he should so charge, to any person or persons, for any term or number of years, without impeachment of waste, for the purpose of raising and securing such portion or portions and maintenance, so as the term and estate to be appointed by way of any such demise or mortgage should be made redeemable on full payment of the portion or portions and maintenance, which should be so charged by virtue of the said power, by the person or persons who for the time being should be entitled to the next estate in remainder, either at law or in equity, on and in the premises so to be limited and appointed by way of demise or mortgage as aforesaid:—and the said testator thereby further willed and directed, that, in like manner, it should be lawful for each of them his said daughters thereinbefore named, to whom estates for life in his said devised estates were thereinbefore limited, when and as they should respectively be in the actual pos-

session of his said devised estates, in case there should be any child or children of their respective bodies lawfully begotten, *other than and besides an eldest or only son*, by any such or the like deed or deeds, instrument or instruments in writing, to be executed and attested as aforesaid, or by their respective last wills and testaments, or any writing or writings of appointment in the nature thereof, to be signed, sealed, and published as aforesaid, to charge all or any part of the said devised estates, with and for the raising and payment of any sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of their respective younger children, with the like power of providing maintenance, and limiting a term of years for raising the said portion or portions and maintenance, and in such and the like manner, to all intents and purposes, as thereinbefore directed with respect to the portion or portions of the younger son and sons, and daughter and daughters, of the said plaintiff, *James Haughton Langston*. And the testator, by his said will, gave all the residue of his personal estate unto the plaintiff, if and when he should attain the age of twenty-one years; but, if he should die under that age, leaving a child or children, then to such child, or if more than one, to such children equally; but, if the plaintiff should die under the age of twenty-one years, and there should be no son or daughter of his body, living at the time of his death, then to the testator's said daughters equally.

“ The said *John Langston*, the testator, departed this life in *February*, 1812, leaving the plaintiff, *James Haughton Langston*, his only son and heir-at-law, (then a minor and a bachelor), and the testator's said several daughters, him surviving, having previously made three codicils to his said will, the last of which bears date in *February*, 1812, but none of them making the least varia-

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tion in, or in any manner affecting, the above-mentioned limitations of his real estates.

“ The plaintiff, *James Haughton Langston* attained the age of twenty-one years in *May*, 1817, and has since that time intermarried, and had issue by his wife two sons, *viz. Henry Langston*, his eldest or first-born son, and *Edward Langston*, his second-born son.

“ The testator had no son other than the plaintiff at or after the date of the said will.”

The question for the opinion of the Court was—Whether the said *Henry Langston*, the first son of the testator's son, *James Haughton Langston*, took any and what estate under the testator's will.

The case came on for argument on a former day in this Term.

Mr. Serjeant *Taddy*, for the plaintiff.—*Henry Langston*, the plaintiff's first or eldest son, takes an estate tail in the premises devised, under the literal construction of the will, without the transposition or insertion of any word; and if not, he would clearly be entitled to take, from the intent of the devisor, which is manifest throughout the whole of the will. The devise is in fact in strict settlement, with the omission of the word *first*. Wills must be construed according to common understanding, and the general intent of the devisor, to be derived from the whole of the will. If the limitation had been to the sons of the body of the plaintiff severally and successively, there can be no doubt but that the eldest must have taken. Estates tail are given to the second, third, fourth, fifth, and all and every other the son and sons of the body of the plaintiff, severally, successively, and in remainder, one after another, as they should be in seniority of age or priority of birth. There is nothing in the will to limit the estate to younger sons, and if the eldest does not take first, the words “ all and every other the

sons, as they shall be in seniority of age" will be altogether inoperative; the words are "all and every other the son and sons" and not "all and every other the *younger* son or sons." All and every the sons must of necessity include all, whether the first be mentioned or not, and the words, "severally and successively" cannot be rejected, although the enumeration of the second, third, fourth, and fifth sons, may be considered as an unnecessary specification. Seniority of age, and priority of birth, must clearly refer to the first or eldest son. It is a general rule in the construction of wills, that the full meaning must be given to every word contained in them; and here the whole of the will is framed on the supposition that the plaintiff's eldest son was to take the first estate. The state of the family must be looked at. The plaintiff was the testator's only son at the time the will was made, but he had several daughters. The deviser first made provision for all the plaintiff's sons and daughters, and the provision for the daughters is on failure of issue male. The sum of 25,000*l.*, which the plaintiff or the daughters of the deviser, in case they should succeed to the estate, are authorized to raise, is only in case there should be any child or children of his or their bodies *other than and besides an eldest or only son*, and which sum was to be distributed among their younger children. If, therefore, it should be held that the plaintiff's eldest son takes no estate, no provision can be made for the younger children, and it is quite clear that the testator meant that the eldest daughter should only take, in case there should be no son, and in the event of her taking, he made provision for the younger daughters; but if the plaintiff's eldest son is not deemed entitled to take under this devise, he and his issue will be left pennyless, whilst *Edward Langston*, the plaintiff's second son, will not only have the estate, but the 25,000*l.* which was to be raised for the portion of the younger children. The Court, therefore, in order to give effect to the intention of the testator, will imply that he meant to give an es-

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tate tail to the first-born son of his own son. The case that bears the nearest resemblance to the present is that of *Clements v. Paske* (a). There, on a devise to *A.* for life, and after his decease to the first and eldest son of the body of his (the testator's) nephew, lawfully issuing or issued, and for default of such issue then likewise to the second, third, and every other son of his nephew successively and in remainder one after another as they should be in seniority of age, and the several and respective heirs male of the body of every such second, third, and every other son or sons, the eldest of such sons and the heirs male of his body being always preferred before the younger:—it was decided that the nephew took an estate tail by implication, in order to effectuate the general intent, and let in the descendants of the first son. In *Doe d. James v. Hallett* (b), the Court went much further, to give effect to the general intent of the testator, than is necessary to be done here. There, the testator devised lands to the use of *A.*, *only surviving* son of *J. S.*, for life, and to his first and other sons, &c., and for default of such issue to the use of the first, second, and of all and every other son and sons of *J. S.* lawfully *to be begotten*, and the heirs male of the body of such first and other sons, with proviso that the said *A.* and his first and other sons, and also the first and other sons *hereafter to be born* of the said *J. S.* should reside at the family house, &c.: and it was held, that the second son of *J. S.*, *born before* the date of the will, should take upon the death of *A.* without issue; and Lord *Ellenborough* there said (c): “It would be a matter of the deepest regret, if, in consequence of the joint effect produced by the blunder of the testator and the neglect of his attorney, we were compelled to put a construction on this will which would defeat the testator's intention, and exclude those whom he meant to make the objects of his bounty. I call it a

(a) 1 Mau. & Selw. 130, n.

(b) 1 Mau. & Selw. 124.

(c) *Id.* 134.

blunder of the testator, because, if he had read over his will with attention before he executed it, he must have perceived that he had misdescribed *William Head* as the only surviving son of Sir *Thomas*, at the time when another son, *Walter James*, then nine years old, was in being, and, as is stated, was then personally known to him. It was also a neglect on the part of his attorney in not making inquiries, after such a lapse of time as intervened between the first and second will, whether the state of his family had undergone any alteration. But I disclaim all considerations of this sort in the present instance, and am willing that the conjoint omissions of the testator and his attorney should have their full legal effect. The will must stand or fall according to the language of it, but I think that language will not, upon a fair construction of it, disappoint the intention of the testator. The first mistake is in the description of *William Head*, as the only surviving son. Now he was not the only son, for there was another living, of the age of nine years. But how does that mistake affect or control the subsequent limitation? The limitation is to the use of the first, second, and all and every other son and sons, &c., that is, who, at the death of *William Head*, would become first son. Therefore, *Walter James* is certainly within the comprehension of the words; there is only a misdescription of the first taker. Then come the words "lawfully to be begotten," which would give rise to a material question, if it had not been settled by a series of authorities, and impeached by none, that, "to be begotten" mean the same as "begotten," embracing all those whom the parent shall have begotten during his life, *quos procreaverit*. It was so considered in *Hewet v. Ireland* (a), and it was there said, that as *procreatis* takes in children to be begotten, and *procreandis* includes children then begotten; so the words, "which shall be begotten," upon which the question

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(a) 1 Peere Wms. 426.

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turned in that case, should relate to the death of the parent; and then the daughter born before the settlement should be included under that description." In equity, an elder son may be considered as a younger, for, in *Duke v. Doidge* (a), the Court said, no question, but where a provision is made by a father, either by will or settlement, for younger children, an elder, unprovided for, shall be deemed such; and the ground is, that every branch shall be provided for, the Court not considering the words *elder* or *younger*. So, in *Beale v. Beale*, the Court said (b), an eldest daughter, though first born, when there is a son, has been often ruled to be as a younger child; and that doctrine was assented to by the Court in *Butler v. Duncombe* (c); and, in *Doe d. Le Chevalier v. Huthwaite* (d), where the devise was to *S. H.* by name, but by description to *I. H.*, who was the second son of the deviser, the Court were of opinion that evidence of the state of his family was admissible to shew whether or not he had mistaken the name of the devisee, and that, upon such evidence being given, the Jury might find whether he had made a mistake in the name or in the description. Here, the manifest object of the testator was to provide for his only son and his issue, and all the other parts of the will are ancillary and subordinate to such intent; and the merely enumerating the second, third, fourth, and fifth sons cannot control the expression "all and every other the son and sons of the plaintiff, according to seniority of age or priority of birth;" and it is equally clear that the daughters were only to take in case there should be no son.

Mr. Serjeant *Wilde, contra*.—The plaintiff's eldest son takes no estate under the will, or, even if he can be deemed to do so, he can only take it after the fifth son; but it has been assumed, that the will is framed with a view to a

(a) 2 Vez. 203, n.

(b) 1 Peere Wms. 245.

(c) Ibid. 451.

(d) 3 Barn. & Ald. 632.

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general provision for the testator's family; but that is not so, for its provisions are arbitrary, and nothing can be collected as to the devisor's general intent:—neither is the will framed according to ordinary or general terms, for the testator first provides for his own son, next for his son's sons, except the eldest, afterwards for his son's daughters, and lastly for his own daughter and her issue in tail. Besides, he gave a larger estate to the daughters of daughters than to the sons of daughters, for to the former he gave an estate in tail general, and to the latter an estate in tail male, and the daughters of daughters are to take before the daughters of sons. If the testator had left one son and one daughter, and each had left a daughter, the daughter of the daughter would be entitled to take before the daughter of the son. But the language of the will is clear, and, as there is neither any latent nor patent ambiguity, the Court must construe the whole of it, so that every clause shall have its meaning, and effect must be given to all the words as they stand upon the face of the will. It frequently happens that the eldest, or some other son of a family is provided for by some distant relation or friend, or by settlement, and if so, the will of the parent is framed to provide for his other children. The Court can have no means of judging in such a case, but must take the will as it stands, without considering its terms; and here, there is nothing upon the face of the instrument, to shew that the plaintiff's first or eldest son was not purposely omitted, as a fortune might have been left him from some other person. The limitation is to the *second*, third, fourth, fifth, and all and every *other* the son and sons of the plaintiff, severally and successively, according to seniority of age or priority of birth; and the plaintiff's *other* sons were not to take until after the fifth, as they should be in seniority of age or priority of birth; but as the testator commenced by enumerating the second son, it was evidently his intention to exclude the eldest or first altogether. It must be admitted, that in equity a younger son who is unprovid-

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ed for may take as an elder; and that an eldest daughter, although first born, when there was a son, is deemed to be a younger child; but here, there is nothing to warrant the assumption that the testator intended that the plaintiff's eldest son should take before the second and others enumerated in the devise. In *Clements v. Paske* the nephew was held to take an estate tail by implication, in order to effectuate the general intent of the deviser; but where a devise is in express terms, and does not mention a particular individual, the Court cannot insert his name, and although they may extend an estate by implication, yet they can only do so where the necessity of the case requires it, or in the absence of any express provision, or when there is an apparent ambiguity, or an utter impossibility to effectuate the intention of the testator without it. In *Doe d. James v. Hallett*, there was a latent ambiguity, as the testator had misdescribed *William Head* as the only surviving son of Sir *Thomas*, at the time when another son was living, and personally known to him. Although it has been said, that, if the eldest son does not take under the devise, he and his family will be left destitute, and that the Court is bound to extend the construction of the will so as to let him in, yet it does not follow as a matter of necessity that he should take. The most correct construction, and that which will do less violence to the words of the limitation, will be, that the first or eldest son of the plaintiff should rank with his *other* sons, after those expressly enumerated. But it has been said, that, if the first son do not take, the intent of the testator with regard to the daughter's portions will be altogether frustrated; but that is not so, for they would be entitled to them if any son were capable of taking; and, as the plaintiff had two sons, the younger of whom is expressly designated, he is entitled to take, to the exclusion of his brother; and, in *Chapman d. Oliver v. Brown*, Lord *Mansfield* said (a): "A Court of Justice

(a) 3 Burr. 1634.

may construe a will, and, from what is expressed, necessarily *imply* an intent not particularly specified in words; but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, *add* to a will, or *supply* the omissions;" and here, as the word *first* was omitted, the Court cannot add or supply it, as it does not appear on the face of the will that the testator meant that the first or eldest son should take. At all events, he can only take after the fifth, for the words 'severally, successively, and in remainder, one after another as they shall be in seniority of age,' cannot apply to the second, third, fourth, and fifth sons, who are previously enumerated and designated, but only to all and every other the sons of the plaintiff, which is the last antecedent; and if this construction prevail, there will be no difficulty whatever as to the provision to be made for the daughters of the deviser.

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Cur. adv. vult.

The following certificate was on this day sent to his Honour the Master of the Rolls.

"We have heard this case argued by counsel, and have considered the same, and are of opinion that the said *Henry Langston*, the *first* son of the testator's son, the said *James Haughton Langston*, takes an estate in tail male under the said will, expectant on the death of his father, the said *James Haughton Langston*.

W. D. BEST.
 J. A. PARK.
 J. BURROUGH.
 S. GASELEE."

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Friday,
Nov. 28th.

RAGGETT and MENDHAM v. BEATY.

By indenture, certain premises were vested in *J. B.* to hold to him, his heirs, and assigns, to the use of such person or persons as *G. B.*, the uncle of *J. B.*, should, by will, direct, limit, or appoint. *G. B.*, the uncle, by his will, directed that the premises should be to the use of *G. B.*, the second son of his nephew, *J. B.*, to enter upon and possess the same after the decease of his father, the said *J. B.*:—and that *J. B.* and *G. B.* should, within one year after testator's decease, pay 100*l.* to two trustees named in the will to discharge legacies; but that, in case *J. B.* and *G. B.* should not pay that sum within the time limited, the trustees should let the premises and receive the rents until the 100*l.* should be paid, they keeping possession of the title deeds and not allowing *J.*

B. or *G. B.* to sell or mortgage until the legacies were paid, and *G. B.* attained the age of twenty-one:—and that, if *G. B.* should die and leave no child lawfully begotten of his body, then the trustees were to sell the premises and distribute the money arising from the sale among *G. B.*'s brothers and sisters:—*Held*, that *G. B.* took an estate tail in the premises devised, upon the death of his father, *J. B.*

THE following case was sent, in pursuance of a decree of his Honour the Master of the Rolls, dated the 15th December, 1825, for the opinion of the Judges of this Court:—

“ By virtue of a certain indenture, bearing date the 1st March, 1766, a certain messuage or tenement and premises, situate in the parish of *Stapleton*, in the county of *Cumberland*, were vested in *John Blair*, to hold to him the said *John Blair*, his heirs and assigns, to the use of such person or persons, and for such estate and estates, uses, intents, and purposes, and in such parts and proportions, manner and form, with or without power of revocation, as *George Blair*, the uncle of the said *John Blair*, should, from time to time, by any writing or writings under his hand and seal, executed in the presence of two or more credible witnesses; or by his last will and testament in writing, or by any writing purporting to be his last will and testament, to be by him signed, sealed, and published, in the presence of three or more credible witnesses, direct, limit, or appoint, give, devise, or assign the same;—and, for default of such direction, limitation, or appointment, gift, devise, or assignment, or, in case any such should be made, when and as soon as the estates or interests thereby limited should respectively end and determine, and as to such part of the said premises whereof no such direction, limitation, or appointment, gift, devise, or assignment, should be made, to the use of him, the said *George Blair*, the uncle, his heirs and assigns, for ever.

“ The said *George Blair*, the uncle, duly made and

published his last will and testament in writing, bearing date the 24th *April*, 1784, which was signed, sealed, and published by him in the presence of three credible witnesses, and thereby, after reciting the indenture last above stated, the testator devised in the words and figures following, (that is to say):—"Now, it is my will, and I do hereby order, that the said premises shall be to the use of *George Blair*, the second son of my said nephew *John Blair*, to enter upon and possess the same after the decease of his father, the said *John Blair*; and I do further order and direct that they, the said *John Blair* and *George Blair*, shall and will pay, or cause to be paid, within one year next after my decease, 100*l.* of lawful money into the hands of my trusty and well beloved friends *William Taylor*, of &c., and *Thomas Blair*, of &c., for them to discharge and pay the legacies hereinafter bequeathed: but, if in case the said *John Blair* and *George Blair* do not pay the said sum of 100*l.* within the time limited, it is my will, and I hereby order, that the said *William Taylor* and *Thomas Blair* do let the said messuage and tenement, and receive the rents arising from the same, until the said 100*l.* be paid, they keeping possession of all the deeds of the estate, and not allowing the said *John Blair* and *George Blair* either to sell or mortgage any part of the premises until the legacies be all paid, and *George Blair* be twenty-one years of age; or, if in case the said *George Blair* die and leave no child lawfully begotten of his own body, it is my will that the said *William Taylor* and *Thomas Blair*, their heirs and assigns, do sell the said messuage and tenement, and distribute the money arising from such sale amongst his brothers and sisters, and *Jonathan Blair*, and *Hannah Todd*, or their heirs, in such share or shares, as they, the said trustees, shall think proper."—The testator then proceeded to give various pecuniary legacies to several persons, amounting together to the sum of 99*l.*; and, after making a disposition of his

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finite failure of issue of *George Blair*, and not on the failure of his immediate offspring at the time of his death. In *Forth v. Chapman* (a), which is the leading case on this point, a testator being possessed of a term, devised it to *A.* and *B.*, and if either of them should die and leave no issue of their respective bodies, then to *C.*; and it was held, that this was a good limitation to *C.* if *A.* or *B.* left no issue at their death. There, both real and personal property were devised, and Lord Chancellor *Parker* drew the distinction, and said (b): “As to the freehold, the construction should be, if *A.* or *B.* died without issue *generally*, by which there might be *at any time* a failure of issue; and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue at their death.” Although that distinction was doubted, if not denied, by Lord *Kenyon* in *Porter v. Bradley* (c), who considered the words, *leaving issue*, as having a confined relation to the time of the death of the parent, in the cases both of real and personal estate; yet the authority of Lord *Eldon* in *Crooke v. De Vandes*, is decidedly in favour of the distinction taken in *Forth v. Chapman*, and his Lordship there said (d): “When I read the case of *Porter v. Bradley*, speaking with all due deference to the learned Judge who expressed that *dictum*, it appeared to me, that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* cited for years, and repeatedly by Lord *Kenyon* himself, as not to be shaken. I never knew it shaken; and if *Porter v. Bradley* has not been since disturbed in the Court of *King’s Bench*, upon the principle expressed by Lord *Alvanley* in *Campbell v. Campbell*, against shaking settled rules, I will not add to the authority of that

(a) 1 Peere Wms. 664.

(b) *Id.* 667.

(c) 3 Term Rep. 146.

(d) 9 Ves. 203.

dictum." In *Tenny d. Agar v. Agar* (a), under a devise of lands to the testator's son and his heirs for ever, as to part of the lands, upon condition that he should pay to the testator's daughter 12*l.* a-year, till she came of age, and then pay her 300*l.*; and in default of payment, that she should enter upon and enjoy the said part to her and her heirs for ever; and, in case his *son and daughter* both died without *leaving* any child or *issue*, he devised the reversion and inheritance of *all* the lands to another: it was held, that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son, and also of the daughter, by implication; the intent being apparent that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take effect:—this being the only construction which would give effect to such intent consistently with the whole of the will taken together. In *Dansey v. Griffiths* (b), where a testator devised lands to *R. D.*, his eldest son, and his heirs; but if it should happen that *R. D.* *should die and leave no issue*, then to his son *W. D.*, and his' heirs; and if he should die without issue, then to his son *E. D.*, &c.: it was held, that *R. D.* took an estate in tail general, under the will. All these authorities shew, that where lands of inheritance are devised to a person by name, or to him and his heirs, and if he die without issue, or leave no child or children of his own, or any words to that effect, they must be taken to apply to an indefinite failure of issue, and consequently to create an estate tail; and as in this case there are no words to restrain the failure of issue at the time of the death of *George Blair*, it is consistent with the intention of the testator that he should take an estate tail with a contingent remainder over in case of an indefinite failure of issue, and if the Court were to adopt a different construc-

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(a) 12 East, 253.

(b) 4 Mau & Selw. 61.

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tion, they would defeat the testator's intent. Although the testator has charged the estate with the sum of 100*l.* for the payment of legacies, yet it does not follow that the trustees were to take in fee, as the charge might be defrayed out of a less estate; and although he directed, that the premises should not be sold or mortgaged by the devisees, *John Blair* and *George Blair*, until the legacies were paid, yet that must be taken to mean, if they were not paid out of the rents, as the trustees were empowered to let the premises and receive the rents until the amount of the legacies were paid; and it is quite clear, on the authority of the case of *Tenny d. Agar v. Agar*, that such a charge would not prevent the devisee from taking an estate tail. In *Dutton v. Engram* (a), a testator devised lands to his wife for life, and after her death to *John*, his eldest son, and to his heirs, upon condition that he, as soon as the land should come to him in possession, should grant to *Stephen*, his second son, and his heirs, an annual rent of 4*l.* out of the said tenements; and if the said *John* died without heirs of his body, the land should remain to the said *Stephen* and the heirs of his body;—it was resolved to be an estate tail. In *Denn d. Slater v. Slater* (b), *A.* devised to his nephew *B.*, but if he died without male heir, then to another nephew *C.* and his heirs; and charged the estate with an annuity to *D.*, and several legacies to other persons, to be paid at a future time; it was held, that *B.* took an estate tail. And in *Goodtitle d. Paddy v. Maddern*, Mr. Justice Grose said (c): “The rule has been long established, that, if the executor be bound to pay the debts by the terms of the devise, he must take a fee in the lands devised to him in respect of which such obligation is thrown upon him: but, if he be only to pay them out of the produce of the land devised to him, or only to take the land after payment of debts;

(a) Cro. Jac. 427. . : (b) 5 Term Rep, 335. (c) 4 East, 500.

there, without words of inheritance, the fee will not pass." So, here, as the trustees were directed to pay the legacies out of the rents arising from the premises, although they were directed to keep possession of the title deeds and not allow *George Blair* to sell or mortgage any part of the premises till he attained the age of twenty-one, yet it will not prevent him from taking an estate tail with a contingent remainder over to the trustees, on an indefinite failure of issue of his body.

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Mr. Serjeant Cross, contra.—This case is not to be determined on artificial reasoning, but from the general intention of the testator to be collected from the whole of his will, and by which it is quite clear that *George Blair* took an estate in fee, with an executory devise over in fee to the trustees named in the will. The testator had not the legal estate in him, but only a power to appoint in fee, in the exercise of which, according to the terms of the trust deed, he gave an estate for life to his nephew, *John Blair*, in whom the legal estate was; and then to the use of *George*, the second son of *John*, after the decease of the latter. Although these words would only give an estate for life to *George*, yet, as the testator proceeded to direct that the trustees should not allow the estate to be sold or mortgaged, either by *John Blair*, the father, or *George Blair*, the son, until the sum of 100*l.* should be paid to the trustees to discharge certain legacies, and *George Blair* should be twenty-one years of age, shews, that, subject to that charge, the testator meant that *John* and *George Blair* together, or *George* as the survivor, should be empowered to sell the estate; but this could not be effectuated unless *George* be deemed to take a fee; and this is apparent, as there is no limitation to any person after *George*, nor is any estate given beyond him, for the trustees take only an equitable estate, or a mere power and not an interest. It is a well known and established rule, that, if words in a will shew an intent that the devisee

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should have a larger estate than an estate for life, and it is not limited in tail, the fee will pass, although there be no words of inheritance. So, it has been a long established rule in the construction of wills, that, if a person devises lands, with a direction that the devisee shall pay a gross sum out of it, the devisee will take an estate in fee simple, without any other words; though the sum directed to be paid should not amount even to a year's rent of the land. This construction is founded on the principle, that a devise of land shall in all cases be intended for the benefit of the devisee. Now, if a devisee in a case of this kind were only to take an estate for life, he might die before he received from the land the gross sum he had paid, and consequently be a loser by the devise:—and, as *George Blair* was not to have the absolute possession of the premises until the sum of 100*l.* mentioned in the will for the discharging of legacies, should be paid; and the testator expressly ordered and directed that the devisees, *John Blair* and *George Blair*, should and would pay, or cause that sum to be paid, the devise must be considered as made on the condition of their paying that sum. In *Collier's case* (a), a testator devised lands to his brother paying to one person twenty shillings, and to others small sums, amounting to forty-five shillings in all, and the land was of the value of 3*l.* per annum; and it was adjudged that the brother took a fee. That principle has been followed by a long series of cases. In *Wellock v. Hamond* (b) *T. W.* devised copyhold lands of the nature of borough *English* to his eldest son, paying forty shillings to each of his brothers and to his sister; and it was decided, that he took an estate in fee. In *Hawker v. Buckland* (c), *Collier's case* was cited, where it was said to have been adjudged, that a devise paying out of profits, or out of lands in general, is no fee simple; but that a devise paying a certain sum at the end of any certain time,

(a) 6 Rep. 16 a.

(b) Cro. Eliz. 204.

(c) 2 Vern. 106.

and the profits not being sufficient, would pass a fee; and that a devise of lands paying a certain sum, without more, is a fee simple. In *Doe d. Willey v. Holmes* (a), the testator gave and bequeathed his freehold house with the appurtenances, and all the furniture thereto belonging, to *E. G.*, whom he made executrix of his will, she paying all the testator's just debts and funeral expenses, and certain pecuniary legacies, within twelve months after his death:—the testator also left to the said *E. G.*, all the rest and residue of his personal estate, and it was held, that *E. G.* took a fee by reason of the latter words in the will, “she paying all my just debts, &c.,” and Lord *Kenyon* said: “In cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case, the devisee only takes an estate for life, but in the latter, he takes a fee; otherwise he might be a loser by the devise. But this point was settled in the case of *Doe d. Palmer v. Richards* (b), where a devise of all the rest, residue, and remainder of the devisor's lands, hereditaments, goods, chattels, and personal estate, “his legacies and funeral expenses being thereout paid,” was held to convey the fee of all the devisor's real estate to the devisee; and Lord *Kenyon* said, “that the first words alone were not sufficient in law to carry a fee; but that he relied on the words immediately following, viz. “my legacies and funeral expenses being thereout paid,” as sufficient for that purpose; for the fund which was to answer those demands, ought to be as ample as possible. That those charges extended to, and were to be taken out of the property which was before given to the residuary legatee; and if that devise did not comprise the whole of the devisor's estate, the interest as well as the land, the legacies and funeral expenses might not be paid.” So, here, as the tes-

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(a) 8 Term Rep. 1.

(b) 3 Term Rep. 356.

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tator directed that the devisees should pay a gross sum out of the lands devised into the hands of the trustees, for them to discharge the legacies bequeathed, it is quite clear that the devisee, *George Blair*, took an estate in fee simple, as the devise might not ensure to his benefit, and the charge was to be paid by him at all events. Although it has been said, that the words, "in case the said *George Blair* die and leave no child lawfully begotten of his own body," must be taken to refer to an indefinite failure of issue, and not be confined to those born or living at the time of his death, yet that cannot be the true construction; for no child of his could take by purchase under this devise. Although the trustees, in the event of *George Blair's* dying without issue, are empowered to sell, yet the ultimate remainder was not in them; and if the devisees paid the sum to the trustees as directed by the will, it would be a compliance with the condition, so as to give *George Blair* an estate in fee in the premises devised, upon the death of his father, *John Blair*.

Mr. Serjeant *Wilde*, in reply.—The charge of 100*l.* for the payment of the legacies cannot of itself operate so as to make the devise in question convey a fee to *George Blair*, the son of the testator's nephew, *John*; if he had paid the 100*l.* within the year after the testator's decease, and died without issue, the estate would clearly be vested in the trustees, as they were empowered to sell and distribute the proceeds of the sale amongst *George Blair's* brothers and sisters, in such shares as the trustees should think fit. The testator clearly meant that the legacies should be paid by the trustees at all events; for he directed that if they were not paid by the devisees within the time limited, the trustees might not only let the premises and receive the rents, but keep possession of all the title deeds, and not allow the devisees to sell or mortgage any part of the premises until the legacies were all paid. A fund was

thereby created, by which the trustees might discharge the legacies; after which, the testator intended that *George Blair* should take an estate tail with a remainder over to the trustees, in case there should be an indefinite failure of issue of his body, and in that event alone; and more particularly so, as coupling the words of the limitation with the other provisions in the will, the general intent of the testator could not otherwise be carried into effect.

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Cur. adv. vult.

The following certificate was on this day sent to his Honour the Master of the Rolls:—

"We have heard this case argued by counsel, and have considered the same, and are of opinion, that the said *George Blair*, the son of *John Blair*, under the circumstances aforesaid, took an estate tail in the said premises, upon the death of his father, the said *John Blair*."

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE."

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN HILARY TERM,
IN THE NINTH AND TENTH YEARS OF THE REIGN OF GEO. IV.

MEMORANDUM.

IN this Term, *viz.* on the 4th February, *Edward Goulburn*, of the *Middle Temple*, Esquire, was called to the degree of Serjeant-at-law, and gave rings, with the motto, "*Nulla retrorsum.*"

1829.

Saturday,
Jan. 24th.

FERGUSON *v.* CRISTALL and Another.

The charterers
of the plaintiff's
ship for three
voyages, on her

THIS was an action on the case. The declaration alleged, that the plaintiff, before, and at the time of the com-
return home from the second, removed the anchors and cables to the defendant's wharf. Shortly afterwards the ship was seized under an Admiralty warrant, and sold for debts due on bottomry bonds and the wages of the crew. Four days previously to the sale, the plaintiff demanded the anchors, &c. from the defendants, they not being included in the sale account of the ship, and they refused to deliver them up:—*Held*, that the plaintiff was not entitled to recover the anchors and cables in trover against the defendants, although the Jury found that they had been removed by the charterers to avoid the process of the Admiralty court, and not in the ordinary course of business, as the plaintiff had no right of possession until after the sale:—*Held*, also, that the removal of the articles from the ship to the wharf was no injury to the plaintiff's reversionary interest.

mitting the grievances by the defendants thereafter mentioned, was the owner of the ship *Maitland*, and of certain goods and tackle thereunto belonging, and therewith used; to wit, divers anchors, and chain cables, of great value; and which ship, together with the said goods and tackle, had been and were before then, by the plaintiff, let to hire and on freight to Messrs. *Fraser & Living*, to be had and used by them, for the purpose of performing certain voyages, upon certain terms and conditions, under and by virtue of a certain charter-party of affreightment, before then entered into between the plaintiff and Messrs. *Fraser & Living*, for that purpose; and that they had the said ship and the said effects on hire and freight as aforesaid:—yet, that the defendants well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, in his *reversionary interest and property* in the said ship and the said goods and tackle, and to deprive him of the benefit and advantage thereof, whilst the plaintiff was the owner of the said ship, goods, and tackle, and whilst the same were so let on hire and freight, and were in the possession of the said Messrs. *Fraser & Living*, for the purpose aforesaid, to wit, on the 28th *December*, 1827, wrongfully and unjustly seized, took, and carried away the said goods and tackle, from and out of the possession and custody of the said Messrs. *Fraser & Living*, and away from the said ship, and wrongfully kept them in their possession for a long time, and greatly injured and damaged the same, and absolutely converted and disposed thereof to their own use; whereby the plaintiff had been and was greatly prejudiced and injured in his reversionary property and interest in the said ship, and in the said goods and tackle, which had become and were wholly lost to him. To this was added a count in trover.

At the trial, before Lord Chief Justice *Best*, at *Guild-*


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—
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hall, at the Sittings after the last *Trinity* Term, it appeared, that on the 19th *February*, 1825, Messrs. *Fraser, Living & Co.* took up the plaintiff's ship, *Maitland*, upon a charter-party for three voyages; that there was a covenant on the part of the plaintiff, as owner, to keep her in proper repair, and to furnish her with all necessary stores and tackle, and, in case of default, a power to *Fraser, Living, & Co.*, to do so, at his expense; and the charterers covenanted to pay for the provisions, and also the wages of the crew:—that the ship had performed two voyages to *India*, and that, on her return to this country from the second; and previously to her arrival in the river *Thames*, viz. on the 7th *December*, 1827, Messrs. *Fraser & Living*, ordered the captain to deliver the anchors and chain cables belonging to the ship, to one *White*, who received them and carried them to the defendant's wharf, they being wharfingers and ship-breakers, and that they were lodged there in his name on behalf of the charterers. That about a month after the removal of the anchors and cables, viz. on the 4th *January*, 1828, the ship *Maitland* and her tackle, apparel and furniture, were arrested by virtue of Admiralty warrants, sued out at the instance of the holders of bottomry-bonds given by the captain to the charterers for the equipment and outfit of the ship, as well as for provisions and the pay or wages of the crew; and that, on the 21st *March* following, the Admiralty Court issued a decree that the ship should be sold, and that the produce should be brought into the registry of that Court, and there kept for the use of the persons who should be entitled thereto. That on the 1st *April*, the ship was sold by public auction at *Lloyd's* Coffee-house; that the proceeds amounted to 6,200*l.*, and that the sum of 584*l.* was deducted for the disbursements and fees in the proceedings in the Admiralty Court, leaving the net proceeds of 5,616*l.*, and that the anchors and cables were not included in the inventory, or sale account. That

four days *previously* to the sale, *viz.* on the 28th *March*, the plaintiff, as owner of the ship, demanded the anchors and cables from the defendants, who refused to deliver them up, assigning as a reason, that they held them as the agents of *White*, or of the charterers, and that the plaintiff was a perfect stranger to them.—Under these circumstances, it was contended for the plaintiff, that the anchors and cables had been improperly or fraudulently removed from the ship by the charterers, in order to avoid the process issued out of the Admiralty Court; and that if they had remained on board and been sold with her, there would have been a surplus on such sale, after satisfying the bill of disbursements and fees of the marshal of the Admiralty, and the wages due to the crew; and that the plaintiff's reversionary interest expectant on the determination of the third voyage, as stipulated for by the charter-party, was injured to the extent of the value of the articles removed; or that, at all events, the right to the possession of them revested in him, so as to entitle him to recover on the count in trover.—For the defendants it was submitted, that the charterers had a right to order the anchors and cables to be removed from the ship to the defendant's wharf, and that the plaintiff's reversionary interest in them was not injured, as they were not seised or sold under the Admiralty warrant and decree; and that, according to the terms of the charter-party, the plaintiff could have no right of possession until the expiration of the third voyage; and, consequently, that he could not be entitled to recover in trover; and the case of *Gordon v. Harper* (a), was relied on to shew, that, in order to maintain such an action, the parties suing must have the right of possession as well as the right of property, and that, unless both these rights concur, the action will not lie; and *Pain v. Whittaker* (b), that where goods lent on hire had

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(a) 7 Term Rep. 9.

(b) 1 Ry. & Mood. 99.

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been wrongfully taken in execution by the sheriff, it was held, that the owner could not maintain trover against the Sheriff, he not having the right of possession as well as the right of property at the time of the sale.

His Lordship left it to the Jury to say, *first*, whether the anchors and cables had been taken out of the vessel for the purpose of being repaired, or in the ordinary course of business, or to avoid the process of the Admiralty Court:—and *secondly*, if they had been, whether the plaintiff had sustained any, and what injury. The Jury found that the anchors and cables had not been removed in the ordinary course, but for the purpose of avoiding the proceedings instituted in the Admiralty Court, and that the plaintiff had been placed in a worse situation by their removal; as, if they had been seized and sold with the ship, a surplus would have remained to him upon such sale, after satisfying the demands made by the Admiralty, and other charges: and they accordingly gave a verdict for him for 244*l.* 15*s.* being the value of the anchors and cables.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered; and he submitted, that, as the anchors and cables had neither been seized nor sold under the Admiralty process; and, as the plaintiff could have no right of possession until after the expiration of the third voyage, for which the vessel was chartered, there was no ground for saying that his reversionary interest had been injured, neither could he be entitled to recover in an action of trover. In *Jackson v. Pesked* (a), it was decided, that if a plaintiff declare as a reversioner for an injury done to his reversion, he must either allege or state an injury of such a permanent nature as to be necessarily injurious to his reversion.

(a) 1 Mau. & Selw. 234.

Mr. Serjeant *Merewether*, now shewed cause.—If the anchors and cables had not been removed by the charterers, but had been seized and sold under the process of the Admiralty Court, the plaintiff would have had the benefit of their value upon such sale; and his reversionary interest expectant on the completion of the three voyages, as specified in the charter-party, was injured to the extent of the sum which he would have been entitled to receive, in case the articles removed had been sold with the ship. At all events, the plaintiff had a sufficient right of possession to entitle him to recover on the count in trover; for in *Loeschman v. Machin* (a), the hirer of a piano-forte, who sent it to an auctioneer to be sold, was held to be guilty of a conversion, and also the auctioneer who refused to deliver it up unless the amount of certain expenses incurred were previously paid; and Mr. Justice *Abbott* (now Lord *Tenterden*) there said: “The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser, except, indeed, in the case of a sale in market overt. With that exception, it is incumbent on the purchaser to see that the vendee has a good title. And I am of opinion that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion.” Although in *Gordon v. Harper* it was held, that, where goods, leased as furniture with a house, were wrongfully taken in execution by the Sheriff, the landlord could not maintain trover against the Sheriff pending the lease, as he had no right of possession, yet that case is dis-

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tinguishable from the present, as there the tenant was in the actual occupation of the house, and in possession of the furniture under an agreement made between him and the landlord, and the tenants' right of possession during the term could not be divested by any wrongful act of the landlord. But here the charterers removed the articles in question, for the express purpose of avoiding the Admiralty process; and if they had been sold under the decree of that Court, the plaintiff would clearly have been entitled to the benefit of such sale.

Mr. Serjeant *Wilde*, in support of his rule.—The defendants, as wharfingers, were merely agents for the charterers; and it cannot be contended for a moment that the anchors and cables in question were removed from the ship to their premises with any fraudulent intent. The charterers had clearly a right to them until the third voyage was completed, and as the defendants received them in the usual course, and the plaintiff did not claim them *after* the sale, the defendants were not guilty of a conversion, as they were responsible to the charterers, by whose order and on whose account they received them.

Lord Chief Justice BEST.—When the facts of this case are fully considered, I think there can be no doubt but that the rule for entering a nonsuit must be made absolute; and although I was much embarrassed at the trial, by the statement and proof of several complicated facts, yet I was clearly of opinion that the count in trover could not be sustained, and I still entertain the same opinion, according to the principle established in *Gordon v. Harper*. Although it was stated by counsel, in *Pain v. Whittaker*, that that case had been over-ruled at *Nisi Prius*, yet Lord Chief Justice *Abbott* said, that he was not aware that it had been, and that it was cited in the last edition of *Selwyn's Nisi Prius*, without any notice that it had been over-

ruled; and his Lordship further said, "that he thought himself bound by that case; and that the principle on which it proceeded was, that the plaintiff had neither the possession or right of possession of the goods at the time they were taken; and therefore the allegation, that 'he was lawfully possessed,' was not supported by the evidence." So here, the plaintiff had neither the possession nor right of possession of the anchors and cables at the time they were removed from the vessel, as he had let them to the charterers for three voyages, one of which remained to be performed. But it has been said, that as they were detached from the ship, and removed to the defendants' wharf by the charterers, and the Jury found that they had not been taken there in the ordinary course of trade, the right of possession reverted to the plaintiff, so as to entitle him to maintain trover, on the authority of *Loeschman v. Machin*. This might have been so, if the removal had been wrongful, as in that case. There, the piano was merely let on hire, at a certain rate *per* month, and, therefore, the borrower had no right to send it *to be sold*; and by so doing, he became a wrong doer, as he had only the possession of it for the special purpose for which it was lent. Here, however, although the Jury found that the anchors and cables were not removed in the ordinary course of business, yet, as they were taken to the defendant's wharf by order of the charterers, it is but fair to presume that they were to remain there for the use of the ship, and that they might be again put on board at the commencement of the third or last voyage, on the completion of which the plaintiff could only be entitled to them; and although the Jury found that they were removed for the purpose of avoiding the process of the Admiralty Court, yet the plaintiff did not demand them *subsequently* to the sale of the ship; if he had, perhaps an action of trover might have been maintainable; but he demanded them four days *previously* to the sale, when the charterers might have required

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them for the use of the ship. As, therefore, the defendants had received the anchors and cables on account of the charterers, who had a right to the possession of them at the time, although their conduct, as far as regards the owner, might have been improper, yet, it would be too much to say, that the defendants were wrong doers in detaining the articles left with them by the order of the charterers, who then had a property in, or control over, them, and more particularly, as the true owner did not make any demand after the sale, when the right of possession could alone revert in him. But it has been said, that the plaintiff has sustained an injury to his reversionary interest, expectant on the determination of the term granted by the charter-party. If the Jury had found that the anchors and cables had been injured, there might have been some ground for the objection; but the mere removal, and their remaining on the defendants' wharf, cannot be deemed to be such an injury to the plaintiff as to entitle him to maintain this action; and for any thing that appeared at the trial, they might have been in as good a state, as when they were placed on the wharf. The plaintiff may still demand them, and if the defendants have damaged or disposed of them, he has a right to bring his action, and recover their value, as he has now a right of possession, as the charterers cannot prosecute the third or last voyage, the ship having been sold under a decree of the Admiralty Court.

Mr. Justice BURROUGH (a).—There was no evidence of any actual conversion by the defendants *after* the sale of the ship, and the plaintiff was not entitled to the possession of the articles in question until then; and as the demand was made *previously*, it was insufficient; and consequently the plaintiff cannot be entitled to recover on the count in trover. I also think, that the defendants cannot

(a) Mr. Justice Park was absent, on account of indisposition.

be liable for the alleged injury to the plaintiff's reversion; and although the charterers might have misconducted themselves by removing the anchors and cables from the vessel in the first instance, yet no fraud can be imputed to the defendants, who received the articles by the order of the charterers, who, at that time, had the right of possession.

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MR. JUSTICE GASELEE.—It is quite clear, that the first count of the declaration, alleging an injury to the plaintiff's reversionary interest, cannot be supported by the facts proved at the trial. I was at first inclined to suppose that there should be a new trial, but I now agree with the Court in thinking that the count in trover cannot be sustained. The plaintiff had no right to commence this action against the defendants, as the articles in question were not removed from the ship at their instance; but they received them in their capacity as wharfingers, from the charterers, who at that time had the right of possession, and entire control over them. This case, therefore, differs materially from that of *Loeschman v. Machin*, as there, the hirer sent the piano to the auctioneer, for an improper purpose, *viz.* to sell; and as the latter refused to deliver it up upon application made to him for that purpose, unless the owner would pay a sum of money which the auctioneer claimed, he was properly held to be also guilty of a conversion. Here, however, when the anchors and cables were delivered to the defendants as wharfingers, Messrs. *Fraser & Living* had the sole control over them, and they might either have caused them to be conveyed to their own premises, or any where else they pleased; and unless the plaintiff had shewn that they were deposited with the defendants with a fraudulent view to his interest, their right to retain them could not be disputed. The charterers' right of possession did not terminate till the sale of the ship in the Admiralty Court; and if they had redeemed the ship, which they might have done by paying the holders of the bottomry bonds, and

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the wages of the crew, they might have equipped the vessel and sent her on her last voyage, according to the terms of the charter-party. So, the plaintiff might have prevented the sale, or purchased the ship subject to the Admiralty and other charges; and as he made no demand after the sale, he cannot be entitled to recover in this action, as he had no right of possession of the articles in question before the ship was sold.

Rule absolute for a nonsuit.

Saturday,
Jan. 24th.

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A date of a letter varying from the post-mark, it was objected, that the mark could only be proved to be genuine by calling the person who impressed it on the letter; on which the Judge who tried the cause offered to stop it till the arrival of a clerk from the post-office; but as it was not insisted on, and the Jury found that the post-mark was genuine, and gave their verdict accordingly, the Court refused to disturb it, the objection having been waived at the trial.—In an action to recover

THIS was an action brought by the plaintiffs, as the holders of a bill of exchange, dated on the 15th *September*, 1824, and drawn by the defendant upon, and accepted by one *Williams*, for 8*l.* 6*s.* 6*d.*, payable to the defendant's order six weeks after date, and indorsed by him to the plaintiffs. The declaration contained a count on the bill, and also counts for goods sold and delivered, money lent, money paid, money had and received, and on an account stated.

Plea—the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the adjourned Sittings after the last *Trinity* Term, the defendant's hand-writing, as drawer of the bill, was proved, and a letter by the defendant to the plaintiffs was given in evidence, instead of direct proof of notice of dishonour by the acceptor, and in which the defendant stated that the plaintiffs' letter of the first instant was received, and that, in reply, he begged to acquaint them that he had a sum of money to receive in town, which would become due

3*l.* 6*s.* 6*d.* remaining due to the plaintiff on a bill of exchange for 8*l.* 6*s.* 6*d.*, which bill was given to secure the balance of an account between the parties, originally amounting to more than 400*l.*:—*Held*, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs under the *Boston* Court of Conscience act (47 *Geo.* 3, s. 2, c. 1), as the 15th section provides that the Commissioners are not empowered to decide on any debt, for any sum, being the balance of an account on demand originally exceeding 5*l.*

about the 16th instant, and that he would request a friend to appropriate a part to the payment of the bill. This letter was dated, "*Boston, 5th January, 1824,*" when it was contended for the plaintiffs, that it was a mistake of the defendant's in dating his letter 1824 instead of 1825; and in order to shew this, the post-mark was referred to, which appeared to be *January 7th, 1825*, the bill having become due on the 30th *October, 1824*. No evidence was offered of the contents of the letter of the 1st *January*, referred to by the defendant in the above letter, or that the bill in question was the only bill between the parties; but evidence was given of other dealings having taken place between them.

For the defendant, it was insisted, that this was not sufficient to go to the Jury to make the letter receivable in evidence, that the post-mark itself was not clear, and that, at all events, a clerk or person from the post-office should have been called to prove that it was a genuine post-mark. On this, the Lord Chief Justice said, that if there were any doubt about the genuineness of the post-mark, he would stop the cause, and send for a clerk from the post-office:—the Jury, however, were satisfied that the post-mark was genuine, and found a verdict for the plaintiffs for 3*l.* 6*s.* 6*d.*, the balance remaining due from the defendant to the plaintiffs on the bill, it having been proved that the acceptor had paid 5*l.* on account.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside and a nonsuit entered, or that the defendant might be at liberty to enter a suggestion on the roll, to deprive the plaintiffs of their costs, pursuant to the 41st section of the statute 47 *Geo. 3, sess. 2, c. 1, (a)*, (*Boston Court of Conscience act*); and in support of the nonsuit, he submitted, that the post-mark had been

(a) By which it is enacted, that if any action or suit for any debt, recoverable by virtue of this act in the said Court of Requests, shall be commenced in any other Court whatsoever, or elsewhere than in

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improperly received in evidence; and he relied on the case of *Fletcher v. Braddyll* (a), where it was held, that although the date upon a post-mark on a letter is *prima facie* evidence that the letter existed at the time of that date, still that it should be proved that the letter bore the genuine post-mark used by the office, whose stamp it purported to bear at the time. And with a view to enter a suggestion, he produced an affidavit of the defendant's attorney, which stated that this action was brought to recover the sum of 3*l.* 6*s.* 6*d.* on a bill of exchange, together with interest thereon, and of which the defendant was the drawer; that the bill was accepted by *Williams* for 8*l.* 6*s.* 6*d.*, and that he, as such acceptor, paid the plaintiffs 5*l.* in part of the amount of such bill, previously to the commencement of this action; and that the Jury found a verdict for them for 4*l.* 0*s.* 2*d.*, *viz.* 3*l.* 6*s.* 6*d.* the sum remaining unpaid on the bill, and 13*s.* 8*d.* for interest thereon: and that the defendant, prior to, and at the time of the commencement of this action, was residing, and has ever since resided and carried on business as a retail grocer, in the borough and parish of *Boston*, in the county of *Lincoln*, and within the jurisdiction of a certain Court of Requests, constituted by a certain act of Parliament, made and passed in the 47th year of the reign of his late Majesty King *George* the 3rd—intituled, &c.

Mr. Serjeant *Jones* now shewed cause.—*First*, the de-

the said Court of Requests, then, and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the Judge or Judges before whom the same

shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said Court of Requests, then, and in every such case, such defendant or defendants shall have costs, and such remedy for recovering the same, as any defendant or defendants may have for his, her, or their costs in any cases by law.

(a) 3 Stark. Rep. 64.

defendant's letter, which was produced in evidence, clearly referred to the payment of the bill in question, and was admissible, as it was merely offered in lieu of direct proof of notice of dishonour by the acceptor; and as it was written at the commencement of a year, namely, on the 5th *January*, 1825, the defendant mistook the date of the year, which is frequently done at the beginning of a new year. The defendant offered no evidence of any other bill than that on which the action was brought; and the mistake in the date was corrected by the post-mark, which the Jury pronounced to be genuine, and which, as they were in the habit of receiving letters by the post, they were warranted in doing. Though, in the case of *The King v. Watson* (a), in an indictment for a libel, Lord *Ellenborough* held, that the production of a libellous letter with the *Islington* post-mark, was not presumptive evidence of a publication in *Middlesex*, as the post-mark might have been forged; yet, there the letter was produced in a criminal proceeding, and therefore a more strict proof was requisite. But, in the case of *The King v. Johnson* (b), where the publisher of a public register having received an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed, to which an answer was returned in the register; after which he received two letters in the same hand-writing, directed as mentioned, and having the *Irish* post-mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant, the previous letter having been destroyed: this was held to be a sufficient ground for the Court to have the letters read. Although, in *Fletcher v. Bradyll*, the post-mistress from the post-office at *Lancaster* was examined, in order to prove that the letter bore the stamp used by the post-office at *Wakefield* at the time of the date; yet, as she was not the person who stamped the letter, she could

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(a) 1 Camp. 215.

(b) 7 East, 65; S. C. 3 Smith, 94.

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only know that the mark was genuine by its general appearance, of which, persons who are in the habit of receiving letters by the post, could have an equal opportunity of judging; but here, the question does not arise, as the Lord Chief Justice offered to stop the cause, and send for a clerk from the post-office, if the Jury should have any doubt that the post-mark was not genuine. In the case of *Arcangelo v. Thompson* (a), was a policy dated in 1797, on goods, by a ship warranted *Danish*, at and from *Trieste* to *Hamburgh*; and the policy was effected in the name of *S. Levy*, who was averred in the declaration to have been the person residing in *Great Britain*, who received the order for and effected such policy; the plaintiff's counsel, to prove the order, gave in evidence a letter from him, dated at *Trieste*, addressed to *Levy* in *London*, and having upon it the *English* ship-letter post-mark, with the date of 1797; and Lord *Ellenborough* held, after argument, that this was sufficient evidence of the receipt of the order by *Levy*, before the effecting of the policy. There, no witness was required to be called to prove whether the post-mark were genuine or not; and in a note subjoined to that case by Mr. *Campbell*, he observes, that, in a *criminal case*, the post-mark upon a letter does not seem to be evidence to prove where or when a letter was put into the post-office; and he refers to the case of *The King v. Watson*.

Secondly, as to entering a suggestion on the roll, the learned Serjeant produced an affidavit of the plaintiff's attorney, which stated, that the action was brought to recover *3l. 6s. 6d.*, being the balance of an account due from the defendant to the plaintiffs for goods sold and delivered, and that that sum was also the balance due upon the bill of exchange declared on; and that at the time the bill was indorsed by the defendant to the plaintiffs, he resided in *London*; and that the sum of *8l. 6s. 6d.*, for which it was drawn, formed

(a) 2 Campb. 620.

part of an account current, amounting altogether to upwards of 400*l.* for goods sold and delivered by the plaintiffs to the defendant, and that the bill was given to secure that balance; and that, by the 15th section of the 47th Geo. 3, it is enacted, "that nothing in that act contained shall extend, or be construed to extend, so as to enable the commissioners to judge, determine, or decide on any debt, for any sum, being the *balance of an account on demand, originally exceeding 5*l.**," and he submitted, that the sum for which the plaintiffs obtained a verdict, fell within the exception in that section; and it was also sworn, that neither the defendant nor his attorney informed the plaintiffs or their attorney of the above act of Parliament, until a few days previously to the trial of the cause. Although the 14th section enacts, that it shall be lawful for the commissioners, and they are thereby enabled to decide and determine all disputes and differences between party and party for any sum not exceeding 5*l.* in all actions or causes of debt, whether such debt shall arise on any promissory note or inland bill of exchange, and in all cases of *assumpsit* and *insimul computasset*; and although, by the 18th section, it is enacted, that it shall be lawful for any person or persons (whether such person or persons shall reside within the jurisdiction of the said Court or not,) having any debt or debts on the *balance of account*, or otherwise howsoever, not exceeding the value of 5*l.*, due or owing, or belonging to him, her, or them, by or from any other person or persons whatsoever, inhabiting, residing, or being within the borough or parish of *Boston*, or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall, stand, or using or *frequenting the markets there*, or seeking a livelihood, or in any way trading or dealing within the same, to apply to the clerk of the court for the time being, or his deputy, who shall immediately make out and deliver to one of the serjeants of the said court for the time being, a summons

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in writing, under the hand of the said clerk, directed to such debtor or debtors, expressing the sum demanded of him, her, or them, and stating the particulars of such demand or cause of action, together with the name of the party demanding the same, and requiring him, her, or them, to appear at a certain time and place to be mentioned in such summons, before the commissioners of the said court, to answer such demands; and on such summons being served, and proof thereof made, the commissioners are empowered to make such orders and decrees, and pass such final sentence or judgment, and award such costs of suit, as to them shall seem most agreeable to equity and good conscience:"—yet the commissioners have only jurisdiction to determine in cases not expressly prohibited by the act; and the 15th section provides that they shall not determine the right to any debt, for any sum being the balance of an account on demand, originally exceeding 5*l*.: and in *M'Collam v. Carr* (a), this Court would not allow a suggestion to be entered for double costs under the *Middlesex* Court of Conscience act, (23 *Geo. 2*, c. 33), where the original debt, being above forty shillings, had, by a balance of accounts, been reduced below that sum; and Lord Chief Justice *Eyre* there said: "The action arises on a contract, part of which has been satisfied by money on account. Is there any case where the ultimate balance of an account only being under forty shillings, the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant might, by this means, come to be decided before a County Court. It seems to me that the original demand ought to be under forty shillings."

Mr. Serjeant *Wilde*, in support of his rule.—If the post-

(a) 1 Bos. & Pul. 223.

mark had been proved to have been genuine by some person who was competent to do so, it would have been sufficient; but there was no evidence of that fact, and the Court cannot take judicial notice of an official seal, or even the signature of a person in office, without proof of its being his hand-writing. In *Arcangelo v. Thompson*, the letter containing the order corresponded with the date of the policy, and there were two modes of shewing that it came from *Trieste*: the one, by proving the hand-writing of the party, and that he was resident there; or that it bore the regular ship-letter post-mark, which might be done by the postman who delivered the letter. But as there was no mistake in the date, the genuineness of the post-mark was not questioned. Here, however, the date in the letter did not correspond with the post-mark, and the Jury could not assume it to be genuine; it should have been proved to be so by the person who stamped it, who is in the nature of a public officer, and specially appointed by the post-office for the purpose. In *Fletcher v. Bradyll*, a letter was proposed to be read in evidence in order to prove an act of bankruptcy, and as it was dated from *Wakefield*, the post-mistress at *Lancaster* was examined to prove that the letter bore the stamp used by the post-office at *Wakefield*, at the time of the date; and she was called, as she was taken to be cognizant of such marks. Although the rule, that the rejection of evidence, which is foreign to points in issue, applies more strongly to criminal prosecutions than to civil cases, yet that cannot apply here; and in *The King v. Watson*, Lord *Ellenborough* held that the post-mark did not even afford *prima facie* evidence, to prove that a letter had been put into the post-office, as the mark might have been forged.

But supposing that the letter in question was properly received in evidence, the defendant is clearly entitled to have a suggestion entered on the roll, under the *Boston* act. The

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15th section is ambiguous in its terms, and seems to apply to cases where the title to land is brought in question; but the 14th is expressly in point, as it empowers the commissioners to decide and determine all disputes and differences between party and party, for any sum not exceeding 5*l.* in all actions of debt, whether such debt shall arise on a promissory note or inland bill of exchange, and in all cases of *assumpsit* and *insimul computasset*. Coupling, therefore, the 14th and 18th sections together, there can be no doubt but that the commissioners were empowered to decide the debt in question, as the latter section gives them full jurisdiction to act in such a case.

Lord Chief Justice BEST.—Taking all the facts of this case together, I am of opinion, that the verdict ought not to be disturbed. The Jury were satisfied that the post-mark on the letter was a genuine post-mark, and regularly made by a person belonging to the post-office. The question then is, whether it is necessary to prove that fact, and who should be called to shew it? Certainly, not the post-master of another office, for he could have no more knowledge of a particular post-mark, than an ordinary individual. In *Fletcher v. Bradyll*, Mr. Justice Holroyd was of opinion, that the post-mark was *prima facie* evidence at the time of the date, but the post-mistress at *Lancaster*, could not positively prove that the letter bore the stamp used by the post-office at *Wakefield*, as she could have no better knowledge of that mark than another person, and the Jury might have been in the habit of seeing the *Wakefield* post mark more frequently than the woman who kept the office at *Lancaster*. When, therefore, the genuineness of a post-mark is doubtful, the person who marked the letter is the best witness to prove it; and the knowledge of all other persons on the subject is equal: but we ought not to adopt the doctrine to the extent contended for, as it would be

necessary to call witnesses from post-offices in the most distant parts of the kingdom, *viz.* from *Cornwall* or *Northumberland* to *London*, to prove the post-mark of every letter, the date of which might be disputed. But it is not necessary to decide that question in the present case, as I was willing to stop the cause until a clerk from the post-office had arrived; but as my brother *Wilde* did not require it, he must be taken to have waived his objection; and the Jury had no doubt but that the post-mark was genuine.

With respect to entering the suggestion under the *Boston* act, if that statute had been confined to cases where the plaintiff and defendant both *resided* at *Boston*, I should be inclined to give it full effect; but it is a great hardship, when a plaintiff's cause of action originally exceeds 5*l.*, that he should be deprived of an appeal to the superior Courts: and we ought not to make *Boston* a place of refuge for debtors, who may fly from their creditors in *London*, when the debt was contracted there. By the 18th section, although the defendant might live in *London*, yet if he kept a shed or stall, or even used or frequented the markets at *Boston*, he would fall within the meaning of the statute. Such an act ought to receive a strict construction; and I am happy to say, that this case does not come within it, for the 15th section takes it completely out of the jurisdiction of the commissioners, as it is expressly sworn, that the action was brought to recover the balance of an account originally amounting to more than 400*l.*, and that the bill in question was given to secure that balance. The 14th section only applies to bills of exchange not exceeding 5*l.*, and here the bill was above that amount, but was reduced by part payment by the acceptor afterwards. I am, therefore, of opinion that this rule must be discharged, particularly as the Jury had no doubt but that the letter written by the defendant referred to the bill on which the action was brought.

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Mr. Justice GASELEE (*a*).—Under the particular circumstances of this case, I am of opinion, that the rule for setting aside the verdict must be discharged; but I do not wish it to be laid down as a general rule, that a post-mark on a letter must be taken to be genuine, unless it be regularly proved to be so. Such a mark is not often disputed, and in a case of absolute necessity, the person who made it might be called to prove it; and perhaps a post-master of another office might be competent to prove the post-mark to be genuine, as was done in *Fletcher v. Braddyll*: but persons in *London*, who are in the daily habit of receiving letters by the post, are equally competent to say whether a post-mark be genuine or not, as the master of an office, distant from the place where the letter was actually put in, and where it was consequently marked. But here, the Lord Chief Justice offered to send to the post-office for a person who was competent to prove whether the post-mark were genuine or not; but as it was not insisted on, it must be now taken as if the objection were waived.

With respect to entering a suggestion on the roll, as it is sworn that the bill of exchange on which the action was brought was originally above 5*l.* and given to secure the balance of an account amounting at one time to more than 400*l.*, I am of opinion that this case falls expressly within the 15th section of the statute, although it was reduced to 3*l.* 6*s.* 6*d.*, by part payment at the time of action brought.

Rule discharged.

(*a*) Mr. Justice *Park* was absent on account of indisposition, and Mr. Justice *Burrough* was at

Chambers, but had previously expressed his concurrence with the opinion of the Lord Chief Justice.

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Tuesday,
Jan. 27th.ELIZABETH SOULBY *v.* PICKFORD and Others.

THIS was an action of *assumpsit*. The first count of the declaration stated, that the defendants were indebted to the plaintiff in the sum of 50*l.* for work, labour, and materials found and provided for the defendant by the plaintiff and her servants. The second count was on a *quantum meruit*, and to these were added the common money counts. The defendants pleaded *non assumpserunt* except as to the sum of 11*l.* 11*s.* and a tender of that sum, which they brought into Court, and which the plaintiff took out. At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiff was a printer, and, by the particulars of demand, she sought to recover 28*l.* 13*s.* for printing and ruling certain rate books for the defendants, who were carriers by water, and in the habit of conveying large quantities of goods by canal. The plaintiff proved the work done, and that its value exceeded the amount sought to be recovered by the particulars, and also the delivery of the books to the defendants; and her counsel relied on the second count of the declaration.—For the defendants, three witnesses proved, that there was an agreement between the plaintiff and the defendants, that she was to print forty-eight copies for 10*l.* and that the plaintiff consented to do the work on those terms, as she expected to be employed by them in future.—The plaintiff then proposed to call witnesses to prove, that she was to be paid 10*l.* for seventy-eight pages; and that if the work exceeded that number, she was to be paid accordingly, and in proportion to such extra length; but the learned Judge refused to allow such witnesses to be examined to set up such contract, or contradict what the defendants' witnesses had sworn; as the plaintiff should have relied on the contract in the first instance, and not opened her case on the *quantum meruit* count, by which

The plaintiff declared in *assumpsit* for work and labour, proved the value of the work done, and relied wholly on the *quantum meruit* count. The defendant proved, that the plaintiff agreed to do the work for a certain sum. The plaintiff's counsel then proposed to shew that she was to be paid that sum if the work did not exceed a given specified quantity, but that if it did, she was to be paid accordingly:—*Held*, that she could not do so, as she should have relied on the contract in the first instance, and that it should have been stated by her counsel in the opening of the case to the Jury.

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she sought to recover according to the value of the work done.

The Jury found a verdict for the defendants.

Mr. Serjeant *Jones* now applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted; and submitted, that the plaintiff was entitled to call witnesses to contradict those of the defendants, as they could not set up a contract in denial of the work proved to have been done by the plaintiff, the value of which she was clearly entitled to recover under the common counts of the declaration; and though the defendants might shew a contract or agreement between them and the plaintiff, still the latter ought not to have been excluded from giving evidence in reply, and shewing that the work was to be done on certain specified terms, and that if it exceeded a certain number of pages she was to be paid accordingly. In *Penson v. Lee* (a), in an action on a policy of insurance, with a count for money had and received, the defendant paid no money into Court, but established as a defence that the risk never commenced; and it was held, that the plaintiff was entitled to a verdict for the premium, although no demand of premium was made by his counsel in opening the case; and Mr. Justice *Chambre* there said (b): "In practice, great indulgence is allowed to the counsel in cases of this sort. Some inconvenience may perhaps arise, from not stating the whole case to the Jury in the opening; but justice is often better obtained by not holding the counsel too strictly to the statement in the opening;" and in *Murray v. Butler* (c), Lord *Kenyon* was of opinion, that although the plaintiff's counsel in his opening might have only claimed the balance of a settled account, still, that if he failed to prove it, he was not thereby precluded from going

(a) 2 Bos. & Pul. 330.

(b) Id. 333.

(c) 3 Esp. Rep. 105.

into evidence to charge the defendant with money had and received to the plaintiff's use. Although in *Stante v. Pricket* (a), where, in an action for assault and battery, the declaration contained but one count, and the plaintiff's counsel, having given evidence of a particular assault, wished to waive it and proceed to prove another and different assault; Lord *Ellenborough* would not allow it to be done, as the plaintiff might select a number of assaults and rely upon the best. So, in *Paterson v. Zachariah* (b), where the plaintiff opened his case on a bill of exchange, and having failed in proving it, proposed to go into a new case of money lent to the defendant; Lord *Ellenborough* said, that he would not admit the plaintiff's counsel to proceed upon another ground; yet here, the plaintiff sought to recover the value of the work done; and the cause of action, as well as the sum claimed, was, according to the terms of the contract she sought to establish, identically the same; and having proved the value of the work done, in the first instance, although the defendants attempted to set up a contract, she had a right to repudiate or contradict it, and shew, in reply, that it was not the entire contract; and that she was not to be limited by it, but that she was to be paid according to a given rate, if the work exceeded a certain number of pages, which would correspond with her original demand, and which she was entitled to recover under the general counts of the declaration.

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Lord Chief Justice BEST.—This was an action for work and labour, and the plaintiff's counsel at *Nisi Prius* opened her case, as if there had been no contract or agreement between her and the defendants, but that she was entitled to recover according to the value of the work done. If there were a contract, it would be inconsistent with justice if the usual course were not pursued, *viz.* to prove the con-

(a) 1 Camp. 473.

(b) 1 Stark. Rep. 72.

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tract at the outset, or on the opening of the plaintiff's case. The defendants proved, by three witnesses, that the plaintiff undertook to print forty-eight copies for 10*l*. The plaintiff's counsel might have cross-examined those witnesses, or shewn that they were not worthy of credit: but instead of that, he proposed to abandon the first cause or ground of action, and present another, founded on a different contract from that proved by the defendants. I am of opinion that this ought not to be allowed, either on the principle of convenience, or of justice; for the plaintiff must have known that such a contract existed, and that it was inconsistent with the general counts of the declaration on which she rested her case. In *Stante v. Pricket*, Lord *Ellenborough* very properly ruled, that a plaintiff, after proving one assault, cannot waive it and offer evidence to prove another; and his Lordship there said, that the plaintiff must shape his case in the most favourable manner he could from the first. The case of *Penson v. Lee* is distinguishable from the present, as there the plaintiff was entitled to a verdict for the return of premium as a consequence of law, as his right to it arose, although the policy might never attach; and it was therefore held that he was entitled to a verdict for the return of premium, when the defence set up imported that the risk had never commenced. So, in *Murray v. Butler*, the counsel, in his opening for the plaintiff, said, that the action was brought to recover the balance of a settled account, which the defendant had admitted; and although he failed in proving such a count, he was not precluded from charging the defendant with money belonging to the plaintiff, which had come to his hands; because the proof of the latter was consistent with the former demand; and there was no inconsistency between the case as opened, and that attempted to be proved. The plaintiff, in his replication or subsequent pleadings, is bound to confine himself to the facts already stated on the record; and, if he do not, it is

a departure. I am therefore of opinion, that, as the plaintiff in the first instance sought to recover according to the value of the work done, and concealed the contract, she could not afterwards resort to it, or be allowed to impeach that proved by the defendants.

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Mr. Justice BURROUGH (a).—If there were any special contract or agreement between the parties for printing the books in question, the plaintiff should have relied on it, and her counsel should have stated it in the outset, and not opened the case on the *quantum meruit* count. The plaintiff's attorney must have known that there was a specific contract between her and the defendants, and he ought not to have concealed it from his counsel, who was thereby evidently misled.

Mr. Justice GASLER.—I am of the same opinion. This case differs from that of *Murray v. Butler*, as there the declaration contained counts for money had and received, and on an account stated: and although the plaintiff failed in proving a settled account, he might certainly adduce evidence to charge the defendant with money belonging to the plaintiff, which had come to his hands, and which was recoverable under the count for money had and received.

Rule refused.

(a) Mr. Justice Park was absent.

1829.

Wednesday,
Jan. 28th.

DILLON and Others, Assignees of HENNELL, a Bankrupt, v. EDWARDS and Another.

The statute 3 Geo. 4, c. 39, s. 1, enacts, "That every warrant of attorney to confess judgment in any personal action, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets in the Court of King's Bench;" and the second section enacts, "That if, at any time after the expiration of twenty-one days next after the execution of such warrant, a commission of bankrupt shall be issued against the person who has given it, then, and in such case, unless such warrant of attorney shall have been filed as aforesaid, within the said twenty-one days from the execution there-

of, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees. An affidavit made by the attesting witness to the warrant of attorney, and filed with it, merely stating its date, and that he saw the party execute it, without specifying the day on which it was executed:—*Held*, to be insufficient, and that the sheriff who had seized and sold goods under a writ issued at the instance of a judgment creditor on a judgment entered up on the warrant of attorney, was liable to the assignees of the party whose goods were seized, in an action of trover, a commission of bankrupt having been issued against him after the seizure, but before the sale.

THIS was an action of trover, brought by the plaintiffs, assignees of *Frederick Hennell*, a bankrupt, against the defendants, *George Nigel Edwards*, Esq., sheriff of *Bedfordshire*, and *James Seamer*, a creditor claiming under a judgment and execution against the goods of *Hennell*, and in which the plaintiffs sought to recover from the defendants the sum of 342*l.* 14*s.* 4*d.*, being the amount of a levy made under a writ of *fieri facias*, sued out by the defendant *Seamer*, and levied by the sheriff, upon the goods of *Hennell*, the bankrupt, before the commission issued under which the plaintiffs were chosen assignees. The cause came on for trial before Mr. Justice *Park*, at *Westminster*, at the Sittings after the last *Hilary* Term; when the following facts being proved, the learned Judge, with the consent of the respective parties, directed that they should be turned into a special case for the opinion of the Court; and the Jury found a verdict for the plaintiffs, damages 342*l.* 14*s.* 4*d.*, subject to such opinion.

The commission was issued on the 9th *August*, 1827, and the plaintiffs were chosen assignees on the 24th *August* following. The bankrupt *Hennell* carried on the business of a linen draper at *Potton*, in *Bedfordshire*; and on the 27th *April*, 1827, a warrant of attorney, under which the said *James Seamer* claimed, was filed at the warrant of attorney office; which warrant of attorney was in the usual form, authorising two attornies therein named to appear for

Hennell as of *Hilary* term then last, *Easter* term then next, or any other subsequent term, and receive a declaration for him in an action of debt for 600*l.* for money lent and advanced to him by *James Seamer*; and the warrant purported to have been dated, signed, sealed and delivered by *Hennell* on the 25th *April*, 1827; and, by a memorandum thereunder written, it was expressed—that the before-written warrant of attorney was given and executed by *Hennell* for securing to *Seamer* the *sum of three hundred pounds*, with interest from the day of the date thereof, and was signed by *Hennell* on the said 25th *April*, and duly attested. With the above warrant of attorney, and at the time of filing thereof, *vis.* on the said 27th *April*, 1827, the following affidavit was also filed:—

“ In the *King's Bench*.—*Robert Haynes*, of *Potton*, in the county of *Bedford*, clerk to *George King*, of the same place, attorney at law, maketh oath and saith, that he was present and did see a certain warrant of attorney (a true copy whereof is hereunto annexed), *bearing date* the 25th *April*, 1827, duly signed, sealed, and delivered by the said *Frederick Hennell* in the said warrant of attorney named; and as and for his act and deed delivered; and that the name set and subscribed thereto is of the proper hand-writing of the said *Frederick Hennell*; and that the name ‘*Robert Haynes*’ thereunto also set and subscribed, is of the proper hand-writing of him, this deponent, *Robert Haynes*.

“ Sworn at *Biggleswade*, this 26th *April*, 1827, before me, *Robert Lindsell*, a commissioner of the Court of *King's Bench* at *Westminster*.”

On the 14th *July*, 1827, judgment by *nil dicit* was entered up upon the said warrant of attorney; and on the same day the defendant *Seamer* sued out a writ of execution from the Court of *King's Bench*, indorsed to levy the sum of 307*l.* 10*s.* 9*d.* besides sheriff's poundage, &c.; and the defendant *Edwards*, as sheriff, and to whom the writ was directed, levied thereunder the sum of 307*l.* 10*s.* 9*d.* upon the goods of the bankrupt *Hennell*; which goods the de-

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defendant *Edwards* had in his possession undisposed of at the time of and after the issuing of the commission against *Hennell*, and also on the 22nd of *September*, 1827; and that, previously to the commencement of this action, a demand was duly made upon each of the defendants by the plaintiffs for the delivery to them of the goods so seized and undisposed of as aforesaid under the said last-mentioned judgment and writ of execution; but the same were refused to be given up by the defendants to the plaintiffs, and were afterwards sold by the sheriff under the levy.

On the part of the plaintiffs, it was contended,—*First*, that the warrant of attorney and affidavit of the execution thereof were not conformable with the directions of the statute 3 *Geo.* 4, c. 39, inasmuch as the time of the signing, sealing, and delivering of the said warrant of attorney was not set forth in the affidavit filed upon the filing of the same, and that such warrant of attorney was therefore not available against the title of the plaintiffs as assignees of the bankrupt *Hennell*;—and *Secondly*, that the execution in question was invalid under the 108th section of the statute 6 *Geo.* 4, c. 16. The defendants, on the contrary, contended, that the provisions of the warrant of attorney act were properly and substantially complied with, and that the 108th section of the 6 *Geo.* 4, c. 16, did not apply to the execution in question.

If the Court should be of opinion that the verdict ought to stand for the plaintiffs, it was to be entered for the sum of 342*l.* 14*s.* 4*d.* with costs; but if they should be of a contrary opinion, a nonsuit was to be entered.

The case now came on for argument, when—

Mr. Serjeant *Wilde*, for the plaintiffs, relied on the case of *Notley v. Buck* (a) as the latest judicial decision on the construction of the 108th section of the statute 6 *Geo.* 4, c. 16; the principles of which, he submitted, not only ap-

(a) 2 *Man. & Ryl.* 68; *S. C.* 8 *Bara. & Cress.* 160.

plied to the present, but were decisive to shew that the execution was invalid; and he also referred to *Wymer v. Kemble* (a), and *Taylor v. Taylor* (b), where that clause of the act had come under the consideration of the Court (c). [But, as the judgment of the Court was confined to the first point, *vis.* as to the validity of the warrant of attorney, it is unnecessary to report the argument on the second]. The learned Serjeant then submitted, that the affidavit filed with the warrant of attorney, was not sufficient or conformable to the provisions of the statute 3 Geo. 4, c. 80, ss. 1, 2 (d), as it did not specify or set forth the time

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(a) 6 Barn. & Cress. 479.

(b) 8 Dow. & Ry. 159; S. C. 5 Barn. & Cress. 392.

(c) See also *Higgins v. M'Adam*, 3 Younge & Jervis, 1.

(d) The first section, after reciting that injustice was frequently done to creditors by secret warrants of attorney to confess judgments for securing the payment of money, whereby persons in a state of insolvency were enabled to keep up the appearance of being in good circumstances; and the persons holding such warrants of attorney had the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors, and for remedy thereof, enacts, "That, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in the Court of King's Bench at Westminster, or such a true

copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other Court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the said Court of King's Bench."

The second section enacts, "That, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution there-

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of the execution of the warrant of attorney. The time when that instrument was taken and executed is the material thing to be looked at, and not the day it was filed. If not, a blank might be left for the date, which might be filled up after the expiration of twenty-one days, or even on the day of filing, which would have all the mischief the Legislature intended to prevent. Although the warrant of attorney is dated on the 25th *April*, the affidavit is silent as to the day of its execution; and, in *Hurst v. Jennings* (a), where a deed, by virtue of which a judgment was entered up, was a contrivance to defeat the provisions of the statute 3 *Geo. 4*, and not having been filed with the proper officer within twenty-one days after its execution; and judgment not having been entered up within that period, as required by the statute, the Court, on an application by the assignees of the obligor who had become bankrupt, ordered an execution issued on the judgment to be withdrawn, as the deed was fraudulent and void as against the other creditors. The rights and liabilities of the parties giving and receiving a warrant of attorney attach at the time of its execution; and it is not for the Court to inquire into or investigate that fact, as it is the duty of the holder of the instrument to file an affidavit of the time of execution on the day the warrant itself is filed. Although it may be said, that the sheriff is not liable to be charged in this action, yet he should either have applied to the Court for an indemnity, or inquired into the nature of the claim of the execution creditor, before he proceeded to a sale; and as the goods were not disposed of at the time of the demand made on him by the plaintiffs, he is equally liable with the other defendant, as the assignees

on, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back, and receive, for the use of the creditors of such bank-

rupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution."

(a) 5 *Barn. & Cress.* 650; *S. C.* 8 *Dow. & Ryl.* 424.

have been deprived of their right by his wrongful act and conversion of the property of the bankrupt.

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Mr. Serjeant *Taddy*, *contra*, after premising, that, under the circumstances, trover could not be maintained, but that the plaintiff's remedy was by an action for money had and received, contended, that the affidavit filed with the warrant of attorney was in strictness a sufficient compliance with the directions of the statute 3 *Geo.* 4, c. 39. It was found as a fact at the trial, and is so stated in the case, that the warrant of attorney was filed on the 27th *April*, and that an affidavit was also filed on that day, in which the attesting witness swore that the warrant of attorney, dated on the 25th *April*, was duly executed by *Hennell*. It must, therefore, be assumed, either that it was executed on the day on which it is dated, or on the following day; and if it were executed at any time between the day of its date and the time of filing, it would be sufficient to satisfy the terms of the statute. But the plaintiffs' rights cannot be prejudiced, even supposing the affidavit be deemed to be insufficient, as twenty-one days had not elapsed between the time of the date and filing of the warrant of attorney, and judgment and execution was entered up and sued out on the 14th *July*, and the commission was not issued until the 9th *August* following.

Lord Chief Justice BEST.—Two points have been raised in this case, the one, as to the construction to be put on the statute 3 *Geo.* 4, c. 39, and the other on the 6 *Geo.* 4, c. 16, s. 108. It is quite unnecessary to consider the latter question, as I am clearly of opinion that the plaintiffs are entitled to retain their verdict, as the affidavit of the attesting witness to the warrant of attorney, and filed at the time of filing that instrument, was not conformable to the directions of the statute 3 *Geo.* 4. The only

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difficulty I at first felt was, whether the sheriff could be charged in this action, as he could have no means of knowing whether the judgment had been duly entered up or not, or whether it had been obtained by virtue of a warrant of attorney. Admitting that, generally speaking, although a judgment be void, if the writ directed to the sheriff be good, he is protected by it, yet the Legislature seem to have had that in contemplation at the time of passing the statute, as they have declared not only that the judgment shall be void, but the execution thereon also. If, therefore, the writ be a nullity, no one acting under it can be protected, and if the sheriff experience inconvenience or hardship from this enactment, the Legislature alone can correct it, for we must expound the law as we find it. [Here his Lordship read the first and second sections of the statute (a)]. The words *filed as aforesaid*, in the second section, do not apply to the mere act of filing the warrant of attorney, but must be taken to have reference to all the circumstances attending it, or the necessary acts to be done by the holder at the time of such filing, one of which is, that an affidavit must be also filed of *the time of the execution*. The Legislature required a full and perfect affidavit of that fact, otherwise the object of the statute would be altogether defeated, and its provisions rendered nugatory; for it is by the affidavit alone that the fact can be ascertained, whether the warrant of attorney was filed within twenty-one days after its execution; and here, the day or time of the execution is not stated in the affidavit, but only that it was dated on the 25th of April. The express object of the statute was to prevent frauds upon creditors by secret warrants of attorney, and its spirit and letter must be strictly attended to; and as the judgment and execution thereon are, by the second section, declared to be deemed fraudulent and void against

(a) See *ante*, page 553.

assignees, unless the warrant of attorney shall be filed, together with the affidavit of the time of the execution thereof; the writ in this case, and under which the sheriff levied, must be considered as a nullity and of no effect. If so, the sheriff and the plaintiff in the execution stand in the same situation, and neither can avail himself of any proceeding under the writ; and the statute provides, that, if the warrant of attorney, and the judgment and execution thereon, be deemed fraudulent and void against the assignees, they shall be entitled to recover back and receive, for the use of the creditors of the bankrupt at large, all and every the monies levied or *effects seized* under and by virtue of such judgment or execution. Whether, therefore, the plaintiffs should have brought an action for money had and received, it is now immaterial to consider, as the execution itself is void under the terms of the statute.

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Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—Although the word *void* has, in some instances, been taken to mean *voidable* only, yet it cannot be so considered here, as the statute not only renders the warrant of attorney and judgment and execution thereon void as against the assignees, but declares that they shall be entitled to recover back, for the use of the bankrupt's creditors, all the monies levied, or effects seized under the judgment and execution.

Mr. Justice GASELBE.—The words of the statute are so strong that we must be bound by them; and although I at first doubted whether the judgment and execution were *absolutely void*, I am now clearly of opinion that they are so, and the plaintiffs are consequently entitled to recover.

Postea to the plaintiffs.

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*Tuesday,
Feb. 3rd.*

A seal to a notarial certificate, of the administration of the oath to a commissioner abroad, who took the acknowledgment of a warrant of attorney, having been broken to pieces and lost, the Court, notwithstanding, allowed the recovery to pass, on filing an affidavit that the seal was duly affixed at the time the oath was administered.

CAREW, Demandant; WHITE, Tenant; FOWNES, Vouchee.

MR. Serjeant *E. Lawes*, moved that this recovery might pass, notwithstanding there was no seal affixed to the notarial certificate of the administration of the oath to the commissioner who took the acknowledgment of the vouchee, to the warrant of attorney, as required by the rule of Court, (*Hilary*, 14 Geo. 3). The learned Serjeant stated, that the acknowledgment was taken in *Upper Canada*, and that the notary duly certified in writing under his hand *and seal*, that the commissioners who took the acknowledgment had made the necessary affidavit. That the notarial seal having either been improperly affixed to the certificate, or made of bad materials, it was found, on its arrival in this country, to be broken to pieces, and that a small part of it only was annexed, when the documents were sent to the cursitor for the purpose of making out the writ of entry, and which part had been since detached and was now lost; and that the officer refused to pass the recovery without the seal, unless he had the sanction of the Court.

Mr. Justice PARK, (the only Judge in Court) ordered an affidavit of the above facts to be made and engrossed on parchment, and filed with the other proceedings, which, having been done, the recovery was allowed to pass (a).

(a) See *Cruttenden v. Bourbell*, 1 Taunt. 144.

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WELLS, LEEVES and DAVIES, Clerks.

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Tuesday,
Feb. 3rd.

THIS was a *Quare Impedit*. The first count of the declaration stated, that from time whereof the memory of man is not to the contrary, there hath been and is a certain chapel with cure of souls, which, during all that time, when full, hath been, and of right ought to have been, and still of right ought to be, served by a curate thereof, that is to say, the chapel of *Burrington*, situate in the county of *Somerset*, and which, during all the time aforesaid, hath been and still is annexed to the parish of *Wrington* in the same county:—that, from time whereof the memory of man is not to the contrary, there hath been and now is, and still of right ought to be, a certain *antient and laudable custom*, used and approved of within the said chapel, (that is to say), that when and so often as the said chapel hath become and been, or shall become and be vacant, and upon every such vacancy happening, it hath been, and shall and may be lawful for *the several persons being then respectively parishioners* of the same chapel, or the majority of them in vestry assembled, (due notice having been publicly given in the said chapel, during or immediately after the performance of divine service there, of the day and time appointed for holding and assembling such vestry), to elect and nominate a clerk in holy orders, to be curate of and for the said chapel of *Burrington*, and to present him to the person, who, for the time being, should or might be rector of the said parish of *Wrington*, for his approbation, in order that the said rector, if he found or finds the said clerk so elected and nominated, a proper person to have and serve the said cure, might and should approve, and, after he should have taken an oath of obedience to him the

An entry in a

custodinem, &c.:
—Held, that it should have been left to the Jury to say, whether the custom was an ecclesiastical or a common law custom.—But it having been left to them generally to consider, whether the election were valid or not, the Court directed a new trial.—It seems that an allegation in a declaration, that there was an antient custom for the several parishioners of a chapel, or the majority of them in vestry assembled, to elect a

curate, is not supported by evidence of a custom of a right to elect by those parishioners only who paid church-rates, or a certain sum to the curate above his tithes.

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said rector for the time being, and his successors, admit the said clerk to the said cure, and present him to the bishop of the diocese within which the said chapel is and hath been situate, for him (if found by the said bishop to be a fit and proper person to have and serve the said cure) to be licensed by him, the said bishop, to serve the same.—The plaintiffs then averred, that, in pursuance of the said custom, heretofore, and on the said chapel becoming and being void by the death of one *George Inman*, clerk, then formerly incumbent thereof, to wit, on the 9th *March*, 1795, to wit, at the chapel aforesaid, in the county aforesaid, certain persons then respectively being parishioners of, and being then and there the *majority* of the parishioners of the said chapel, and then and there in vestry duly assembled, pursuant to such notice as in that behalf aforesaid, before that time, to wit, on &c., at &c. aforesaid, duly given, did then and there elect and nominate one *Sydenham Teast Wylde*, then and there being a clerk in holy orders, and a proper person to have and serve the said cure, to be curate of and for the said chapel; and did then and there present him to the defendant, *William Leeves*, who then and there was, and still is rector of the said parish of *Wrington*, for the purposes in that behalf mentioned, according to the said custom; and that the defendant *Leeves* did then and there approve the said *S. T. Wylde*, and did, after the said *S. T. Wylde* had taken such oath in that behalf as aforesaid, then and there admit the said *S. T. Wylde* to the said chapel, and did then and there present and nominate the said *S. T. Wylde* to the then Bishop of *Bath and Wells* (the said chapel being then and there and still within the diocese of the said bishop), to be by him licensed to serve the said cure; and the said *S. T. Wylde* was afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, duly licensed by the said bishop to serve the same accordingly.—The plaintiffs then averred, that afterwards, to wit, on the 12th *May*, 1826, the said

chapel of *Burrington* became void by the death of the said *S. T. Wyld*, and yet is void; whereby, and by virtue of the premises, and of the said *custom*, it then and there belonged to the *then parishioners* of the said chapel so in vestry assembled, (such notice having been given in that behalf as aforesaid), or *the majority* of them, to elect and nominate a clerk in holy orders, being a proper person to have and serve the said cure as curate of the said chapel; and that, afterwards, to wit, on the 14th *June*, 1826, at the chapel aforesaid, in the county aforesaid, *the plaintiffs* being then and there the *majority of the parishioners* of the said chapel, duly assembled in vestry (due notice having been previously, to wit, on &c. last aforesaid, at the chapel aforesaid, publicly given in the said chapel, during or immediately after the performance of divine service there, of the day and time appointed for holding and assembling such vestry), to elect and appoint a clerk in holy orders, curate of the said chapel; whereupon, the plaintiffs, being and constituting the *majority of the then parishioners* of the said chapel so assembled in vestry as aforesaid, then and there elected and nominated *James William Arnold* (the plaintiff) to be curate of the said chapel, he the said *J. W. Arnold* being then and there a clerk in holy orders, and then and there a fit and proper person to have and serve the said cure; whereupon, and by virtue of such election and nomination at such vestry so assembled as aforesaid, it belonged, and still doth belong, to the plaintiffs to present the said *J. W. Arnold* to the defendant *William Leves*, so being such rector as aforesaid, for the approbation of him the said defendant *W. Leves*, as a fit and proper person to have and serve the said cure; so that he should and might, after he should have taken such oath as aforesaid, be by the said defendant *W. Leves* admitted to the said cure, and presented to the said bishop of the said diocese, in order that he, the said *J. W. Arnold*, if he should be found by the said bishop to be a fit

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and proper person to have and serve the said cure, might be licensed by the said bishop to serve the same:—but that the defendants unjustly hindered them, the plaintiffs.

The second count alleged, that the parishioners of the chapel, or the majority of them in vestry assembled, had a right to elect and nominate a clerk in holy orders, curate of the chapel, and to present him to the rector for approval, under and by virtue of an act of Parliament passed in the 11th year of the reign of *Henry 7th*, which act had been lost and destroyed by time and accident.

The bishop pleaded the usual plea of disclaimer, *viz.* that he did not claim to have any thing in the chapel, except only the licensing of the ministers to the same, and all other things as belonged to the ordinary as such.

The defendants, *Leeves* and *Davies*, as to the first count of the declaration, pleaded, that the chapel was part and parcel of the rectory of *Wrington*, whereof the defendant *Leeves* was rector, and that it belonged to him as such rector, in right of his rectory, to nominate and appoint the curate to the chapel, as often as it should become vacant; that, on the chapel's becoming vacant by the death of *Inman*, in *March*, 1795, the defendant *Leeves*, as such rector, nominated and appointed *Sydenham Teast Wylde* as curate, and presented him to the then bishop of the diocese, by whom he was licensed; that on the 12th *May*, 1826, the chapel being then void, as in the first count mentioned, the defendant *Leeves*, as rector as aforesaid, nominated and appointed the defendant *Davies* as curate, and presented him to the bishop to be licensed as such curate.—The plea concluded by traversing the custom, in manner and form as the plaintiffs had in the first count in that behalf alleged. The defendants *Leeves* and *Davies* to the second count of the declaration, after alleging that it belonged to the rector to nominate and appoint a curate, and that the defendant *Leeves*, as such rector, nominated and appointed *Wylde* in 1795, and *Davies* in 1826, and presented him to the bishop, con-

cluded by traversing the act of Parliament in the second count mentioned. They pleaded *thirdly*, to the whole of the declaration, that the plaintiffs did not elect *Arnold modo et formâ* as in the declaration alleged.

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There was a *cesset executio* as to the bishop, and issue was joined on the last plea of the defendants *Leeves* and *Davies*; and to the first and second, the plaintiffs replied, that there was such a custom and such an act of Parliament as in the first and second counts mentioned; on which issues were also joined.

At the trial, before Mr. Justice *Littledale*, at the last Assizes at *Wells*, the plaintiffs produced the following documentary evidence in support of the alleged custom, on which their claim to elect and nominate a curate was founded, namely, *first*, an entry in a book kept in the registry of the bishop of *Bath and Wells*, intituled, "*Registrum Instrumentorum Clericorum exhibit. in Visitacōe trienniali, Ep̄ali. Bathon. et Wellen. in anno 1606*," to the following effect:—

"BURRINGTON.

"*Johannes Tristram clericus ordinat. presbiter per D̄m. Willm Cestren. Ep̄m, 8 Aprilis, 1576, admiss. ad curā animaru. in Eccl̄iā. ih̄. per D̄m. Ricardum Forster clicū nup. Rectorem de Wrington juxtā consuetud. etc., 27 Septembris, 1591.*"

"*Licentiat. ad concionand. per D̄m. Thomā nup. Bathon. et Wellen. Ep̄m. 7 Januar. 1588.*"

Secondly, the following extract from the Parliamentary Survey, taken at the time of the usurpation, in 1649:—

"The parish of *Berrington* consisteth of about four score and six families. There is in it a church or chapel, being, as we conceive, a donative, worth, *per annum*, about three and forty pounds.

"The minister there hath *usually* been *elected by the parishioners of Berrington*, and approved of by the rector of *Wrington*.

"Mr. *Richard Powell*, an able preaching minister, is now

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incumbent there. The tithes of corn, hay, wood, and teasles, *payable* out of the parish of *Berrington* to the parson of *Wrington*, are worth *per annum* twenty-two pounds, and may be added to *Berrington*."

Thirdly, the nomination by Dr. *Waterland*, the rector, of Mr. *Inman*, the predecessor of *Wylde*, as curate, on the 12th *July*, 1744, which was found in the bishop's registry, and which was as follows:—

"Whereas, the cure of the chapel of *Burrington* within the parish of *Wrington*, in the county of *Somerset*, was lately vacant by the death of the Reverend Mr. *Francis Wilks*, the last incumbent, and thereupon *George Inman*, A. B., was *elected and nominated* for his successor by the parishioners of the chapel of *Burrington* aforesaid, and was presented by them to me, *Henry Waterland*, rector of *Wrington*, in the diocese of *Bath and Wells*, for my approbation; and if I found him a proper person to serve the said cure, to admit him according to the tenor of a certain *statute* relating to the said chapel:—therefore, I, *Henry Waterland*, rector of *Wrington*, being well assured of the good life, morals, and learning of the said *George Inman*, do approve of him to serve the cure of the said chapel of *Burrington*; and after taking the oath of obedience to me and my successors, by these presents, I do admit and do present him to be licensed to the said chapel of *Burrington*."

Fourthly, the nomination by the defendant *Leaves*, as rector, of Mr. *Wylde*, on the 1st *May*, 1795, which was in the same terms as the nomination and approval by Dr. *Waterland* of Mr. *Inman*, with the mere alteration of date and names.—The plaintiffs then called witnesses to shew, that, previously to the election of *Arnold*, viz. on the 20th *March*, 1826, a rate or assessment was made on the parishioners of *Burrington* at six-pence in the pound for the repairs of the church; and that, on the 8th *June* following, notice was given, that it was agreed that the persons so rated should be the only voters at the election. That every parishioner who was at the election, and whose name was on the rate, voted,

but that several who were rated did not attend; and that the proxy of a parishioner who was absent was refused on the part of the defendants, because the name of his principal was not inserted in the rate; whilst the vote of one of the parishioners who was present was admitted for the plaintiffs, although his name was not inserted.

On the part of the defendants, in order to rebut the presumption that the alleged custom had *immemorially* existed within the chapelry of *Burrington*, they produced an extract from the Ecclesiastical Survey of the 26th *Henry 8*, (1535), on which they mainly relied, the literal translation of which is as follows:—

“ *Archdeaconry of Bath.*”

“ *Deanery of Radclyff.*”

“ *Somerset.*”

“ *Wrington*, with the chapel of *Berrington* annexed—
James Fitz-James, rector there:—

The rectory there is worth, by the

year, <i>viz.</i> in demesne lands	-	£	2	0	0
Prædial tithes	-		28	0	0
The tithe of wool and lambs	-		0	10	0
<i>Oblations</i> , with <i>personal tithes</i>			14	14	8½
					£45 4 8½

From thence,

In pence paid to the Archdeacon

of <i>Wells</i> , as of Synodals	-	0	7	5½
To the Bishop, as of procurations		0	1	4
To the Abbot of <i>Glastonbury</i> , for a pension	-	2	0	0

And to a *certain priest* celebrating
in the said chapel annexed, for
his *stipend annually* by composi-
tion

tion	-	-	-	-	-	3	6	8				
										5	15	5½
And there remains clearly						-	-			39	9	2½
The tenth from thence						-	-			£3	18	11½

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The defendants, then, in order to shew that the custom for the parishioners, as alleged in the declaration, or the majority in vestry assembled, to elect, was only a qualified and conditional custom, produced an entry in the parish or church book of *Burrington* on the election of Mr. *Inman*, as curate, in 1744, and which was as follows:—

“ *April 30th, 1744.*”

“ At a general meeting of the *inhabitants* of the parish of *Burrington*, notice being given the *Sunday* before in the parish church; the Reverend Mr. *George Inman* was unanimously elected chaplain of the said church of *Burrington*, vacant by the death of the Reverend Mr. *Wilks*, by us whose names are hereunto subscribed, having a right to elect, *upon the account of paying four pounds to the said chaplain, over and above his tithes.*”

This entry was signed by the churchwardens and fourteen other persons.

They also produced another entry in the parish book of *Burrington*, on the election of Mr. *Wylde*, as curate, in 1795, as follows:—

“ *March 9th, 1795.*”

“ At a general meeting in the parish church of *Burrington*, notice being given the *Sunday* before, it is unanimously agreed by us, the *parishioners* of the aforesaid parish, who have hereunto set our names, to elect the Reverend Mr. *Sydenham Teaste Wylde*, chaplain of the said parish church of *Burrington*, vacant by the death of the Reverend Mr. *George Inman*, the late incumbent; the said *parishioners* having a right to elect, on account of *their paying four pounds per annum over and above to the said chaplain, exclusive of his tithes.*”

This entry was signed by the churchwardens and twenty-two other persons.

It was then submitted for the defendants, that the entry from the register of clerical instruments, exhibited at the triennial episcopal visitation, in 1606, was inadmissible as

evidence for the plaintiffs, as it related to a bye-gone transaction, and did not contain the original admission of the person therein named, but a mere statement or entry of that fact. The learned Judge, however, allowed it to be received, and eventually left it to the Jury to say, whether the election of the plaintiff *Arnold* by the parishioners on the 14th *June*, 1826, was or was not a valid election. They found in the affirmative, and that they had an absolute right to elect, and accordingly gave a verdict for the plaintiffs.

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Mr. Serjeant *Merewether*, in the last Term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, or a new trial granted; or that the judgment might be arrested: and in support of a new trial, he submitted, that, as the entry in the register of the triennial visitation in 1606, did not contain the original admission of *John Tristram* therein named, which was deposited with the bishop, and which was the best evidence of that fact, the entry was improperly received; and more particularly, because it did not appear by whom the entry was made; and the admission was stated to have taken place in 1591, which was fifteen years before the date of the register (a). That the evidence adduced by the plaintiffs in support of the general and antient custom for the parishioners to elect, as alleged in the declaration, was insufficient; and that the weight of evidence was in favour of the defendants, with respect to the right to elect.

As to the nonsuit, it was insisted, that the right of the parishioners to elect, as alleged in the declaration, was a general and unlimited right, whilst the right proved by the entries in the parish books of 1744 and 1795 was a qualified and conditional right, and confined to those parishioners who paid 4*l.* a year to the chaplain over and above his tithes.

(a) The learned Serjeant had tendered a bill of exceptions, as to the entry having been improperly admitted in evidence, which the Court directed to be abandoned, previously to the application for a new trial.

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In arrest of judgment, it was contended, that it was incumbent on the plaintiffs to have shewn a seisin either in themselves or in those under whom they claimed; and that, as parishioners not being incorporated are a mere fluctuating and uncertain body, they were incapable of having such a seisin, by reason of their inability to take by succession; and that, therefore, the plaintiffs being parishioners could not maintain the present suit. And *Buller's Nisi Prius* (a), *The King v. The Marquis of Stafford* (b), *The King v. The Bishop of Chester* (c), *Comyns's Digest* (d), *Russell v. The Men of Devon* (e), and *Farnworth v. The Bishop of Chester* (f), were relied on, as authorities establishing that position.

Mr. Serjeant *Wilde* and Mr. Serjeant *Edward Lowe* now shewed cause, and submitted, that the entry in the register of visitations was properly received in evidence, as the book itself was produced from the registry of the Bishop of *Bath and Wells*, which was the proper custody, and where it was deposited for the purpose of shewing what had taken place at the different visitations of bishops, as well as the names of the persons who had been admitted as curates within this particular diocese, and by whom they were presented and admitted; and as the election of the plaintiff *Arnold* by the parishioners was according to a long established custom, evidence of reputation was admissible to prove a prescriptive right in them to elect. Besides, the book in question was a public instrument or document, and was evidence of the facts therein contained: and the entry was not given in evidence for the purpose of proving a particular custom, but only to shew that a person had been admitted curate according to custom, and evidence might be

(a) 7th Edit. by Bridgman, 122 a.

(b) 3 Term Rep. 646.

(c) 1 Term Rep. 396.

(d) Tit. "Pleader," 3 l. 4.

(e) 2 Term Rep. 667.

(f) 4 Barn. & Cress. 572, S

C. 7 Dow. & Ryl. 56.

adduced in proof of such custom. In *Bullen v. Michel* (a), a ledger or chartulary of the Abbey of *Glastonbury* was held to be admissible as evidence of the endowment of a vicarage, although it contained an account of matters of a miscellaneous description, and, among other things, entries which appeared to be transcripts of contemporaneous documents considered as authentic; and which transcripts purported to give an account of the license of appropriation of the parish, and also an account of the several matters of endowment. In *Buller's Nisi Prius* (b), it is said, that where a person would prove relationship by a will, he must have the original will, and not the probate only; yet, that the ledger-book is evidence in such case, because it is not considered merely as a copy, but is a roll of the Court. In the case of the Bishop of *Meath* v. Lord *Belfield* (c), it was held, in a *quare impedit*, after the plaintiff had given in evidence an entry in the register of the diocese of an institution or collation, in which entry there was a blank where the patron's name was usually inserted, that parol evidence of the general reputation of the country was admissible, on the ground that a presentation might be by parol, and that what commenced by parol might be committed to posterity by parol, and that this created a general reputation.

Although it has been insisted, that the custom, as laid in the declaration, was not proved, as it did not state the right to elect the curate to be confined to those parishioners who paid 4*l.* to the chaplain over and above his tithes; yet the Parliamentary Survey of 1649 is the best evidence of the custom; and in which it is stated, that the minister had been *usually elected* by the parishioners of *Burriton*, and *approved of* by the rector of *Wrington*; and there is no mention of any qualification or limitation of the parishioners at large to elect. The Parliamentary Surveys

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(a) 2 Price, 399; S. C. 4 Dow's Rep. 297.

(b) 7th Edit. by Bridgman, 246 a.
 (c) 1 Wils. 215.

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have always been received as the highest authority in Courts of law, and have the credit of having been taken with extreme accuracy and minuteness (a). The parishioners at large, therefore, or the majority of those in vestry assembled, had clearly a right to elect the plaintiff *Arnold* as curate; and the limitation of the right to those who paid the church-rate did not appear to have been exercised previously to his election; and the condition to pay 4*l.* a-year to the chaplain or curate might be either precedent or subsequent to the election; but the right to elect does not depend upon the actual payment of that sum, and it was, in all probability, resorted to for the purpose of ascertaining who were parishioners; and, although some of them might have been defaulters, they would still have a right to insist on their suffrage to elect. So, though the payment of rates might afford the best test of the actual number of the inhabitants of the parish who were qualified to vote, still it did not deprive the parishioners at large of their right to elect. The Jury were, therefore, warranted in finding that they had a general and absolute right so to do.

Mr. Serjeant *Merewether*, in support of his rule.—If the entry in the register-book of 1606, found in the registry of the bishop, had been an entry of an exhibit actually made at the time of the bishop's visitation, it might have been received in evidence; but it did not contain the original admission of the party therein named, but was merely an entry of a parol declaration as to a particular fact which took place long previously to the entry; and as it related to an admission made by the *late* rector of *Wrington*, the party making the entry could have no knowledge of that fact but by general reputation; and such reputation is not admissible in proof of a particular fact. In the case of *The King v. The Inhabitants of Eriswell*, Lord *Kenny*, adverting to the case of *The Bishop of Meath v. Bel-*

(a) See *Blundell v. Howard*, per *Ellenborough*, C. J., 1 Mau. & Selw. 294.

field, said (a): "I admit that a presentation may be by parol, and may be proved by parol, that is, by a witness who was *present and heard it*, but I deny that in such a case common reputation could be given in evidence."

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At all events, there was a fatal variance between the custom by the parishioners to elect as alleged in the declaration, and that proved at the trial; and, although it has been said, that the Parliamentary Survey of 1649 is the best evidence to shew the right to be in the parishioners at large to elect the minister or curate, yet there was no documentary or parol evidence of any common-law custom to deprive the rector of his right to nominate or appoint his own curate. In *Gape v. Handley* (b), which was an issue to try whether the presentation to a rectory belonged to the mayor and aldermen, or to the mayor, aldermen, and burgesses at large, Lord *Mansfield* said (c): "The restriction of the presentation at large to the select body is the most reasonable restriction that can exist. A popular election of a minister raises fumes and heats among the parishioners, and tends much to destroy christian charity." The Ecclesiastical Survey of *Henry 8*, and the entries in the parish books of 1744 and 1795 were the only documents the defendants offered in evidence. The survey is altogether silent as to the custom, but merely states that 3*l.* 6*s.* 8*d.* was payable by the rector annually to the officiating priest or minister for his stipend. The words *juxta consuetudinem* in the register of visitations, is the only expression which can be found to shew any thing resembling a custom; and as those words were introduced in a document belonging to the church, they must be taken to apply to an ecclesiastical custom, which may exist after forty years, and need not be proved to be from time immemorial, as in the case of a common-law custom. Even admitting the accuracy of the Parliamentary Survey, it is

(a) 3 Term Rep. 723.

(b) 3 Term Rep. 288, n.

(c) *Id.* 291.

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confirmatory of this assumption, for it states that "the minister of *Burrington* hath *usually* been elected by the parishioners." The word "*usually*" may be consistent with an ecclesiastical custom, as well as that referred to in the register by the words *juxta consuetudinem*, and these words, so far from implying an immemorial custom, raise an inference of an ecclesiastical rather than a common law custom. In *Ratcliffe and Chaplin's* case (a), the Court held, that customs should be taken strictly; and Lord Chief Justice *Cooke* said, there are two pillars of custom, one the *common usage*, the other, that it be *time out of mind*. At all events, a custom must be proved as laid, for in *Wilson v. Page* (b) a plea justifying under a custom for the tenants of a particular copyhold to dig gravel, &c., was held not to be supported by evidence of a custom embracing the copyholders of the manor generally; and Lord *Kenyon* there said, that the defendant having pleaded a custom confined to a *particular* tenement, should be bound by his plea, and confined to evidence of it only. Here, the only instances adduced at the trial of the election of a chaplain or curate, are those of 1744 and 1795, which are inconsistent with the general right of the parishioners, or the majority of them in vestry assembled, to elect, as alleged in the declaration; for those entries are conclusive to shew that such right was confined to the inhabitants of the parish who had paid 4*l.* to the chaplain beyond his tithes. From those entries it must be inferred, that even those parishioners who had paid church-rates had no right to vote, but only those who contributed to the maintenance or support of the chaplain or curate. The sum of 4*l.* payable by the parishioners individually, is, most probably, in lieu of that which was paid by the rector to the officiating priest at the time of the Ecclesiastical Survey; and the right to elect the curate was consequently given

(a) 4 Leon. 242.

(b) 4 Esp. Rep. 71.

up by the rector to the parishioners, on their relieving him from the payment of that annual stipend. It cannot be contended for a moment, that the sum of 4*l.* has been paid by the parishioners to the curate from time *immemorial*, as, at the time of the Parliamentary Survey, the rectory of *Barrington* was stated to be worth only from 40*l.* to 50*l.* a-year, and that nearly 15*l.* of that amount was made up of oblations and tithes.

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Lord Chief Justice BEST.—I am of opinion, that there must be a new trial in this case, which I much regret, as the preferment is of so trifling a nature, since it only amounts to the annual value of 100*l.* One of the grounds on which a motion has been made for a new trial is, that the entry in the register of visitations in 1606, was improperly received in evidence at the trial; but I am of opinion, that it was admissible, and properly received. But I very much doubt, whether sufficient attention was paid to the circumstance, as to whether the custom relied on for the plaintiffs was an *ecclesiastical* or *common law* custom; and as the attention of the Jury was not called to that point, the cause must go down to be re-tried. If the nature of the custom be considered with reference to other evidence in the cause, particularly the entries in the parish books as to the election of the chaplains or curates in 1744 and 1795, it appears to me to be rather an *ecclesiastical* than a *common law* custom. The main ground on which I think the entry in the register was admissible is, that it is the duty of the bishop, at his visitations, to inquire how the different parishes within his diocese are served; if the duty be performed by the rector, he needs no further investigation, but if the parish be served by a curate, it would naturally lead him to ask how and by whom he was appointed, and if the Bishop had done so in this case, he would have been informed that the appointment was made by the late rector. If so, the bishop would re-

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quire further explanation, as the authority of the rector to appoint ceased at his death; but to remove that difficulty, it might be said, that the curate was appointed according to custom, which would lead the bishop to inquire into the nature of such custom. But the evidence adduced at the trial, did not shew whether the custom relied on for the plaintiffs, was a common-law or ecclesiastical custom. The nature of the custom must be collected from usage, as it is alleged in the declaration to be an ancient custom; but only two instances of election of curates were adduced at the trial, the one in 1744, the other in 1795, and neither of these agreed with the custom as claimed by the plaintiffs. It is stated by them to be a general custom for the parishioners, or the majority, in vestry assembled, to elect; whereas by the entries in the parish books, the right appears to be limited to those inhabitants who pay four pounds to the chaplain, over and above his tithes. That qualified or restricted right should have been set forth in the declaration. — Another strong ground on which I think this case deserves further inquiry is, that it appears, that within one hundred and eighty years from this time, the rectory was only worth between 40*l.* and 50*l.* a-year, more than one fourth part of which was made up by the payment of certain oblations and tithes. It cannot be supposed for a moment that the inhabitants of the parish should have paid 4*l.* a-year to the chaplain, in the time of *Richard* the first, the period of legal memory, or from time immemorial, when it appears that within two centuries the whole rectory was not worth 50*l.* a-year. Four pounds was an enormous sum at that period, and it therefore appears to me that the custom referred to in the register, coupled with the Parliamentary Survey, in which the word "*usually*" is introduced, is an ecclesiastical and not a common-law custom. It must also be observed, that in the extract from the Ecclesiastical Survey of *Henry* the 8th, an annual stipend of 3*l.* 6*s.* 8*d.* is stated to be payable by the rector to the officiating priest, for his annual stipend, but no

evidence was adduced to shew whether that payment was still continued, or whether the rector might not have made some bargain with the parishioners, giving them a right to elect on their paying 4*l.* a-year to the curate, instead of the stipend originally paid to him. That circumstance certainly ought to be fully inquired into. The right of nominating a curate is, by the common law, in the rector; and when a custom of this nature is relied on by the parishioners, it ought to be clearly and satisfactorily proved; for, as was said by Lord *Mansfield*, in the case of *Gape v. Handley*, nothing is so likely to engender feuds and bad feelings between a minister and his parishioners, as a meeting of the latter in the church, and contending for the nomination of a curate or chaplain to preach there. It is always desirable that the rector, who is considered as the head of the whole parish, should have the right of nominating his curate, and that the election of the latter should not be left to the parishioners at large; and the rector ought not to be deprived of his right, unless such satisfactory evidence be adduced, as would leave no doubt in the mind of any reasonable person of the existence of a long established custom depriving the rector of his right of such nomination.

Mr. Justice PARK.—Every person who wishes well to the cause of religion, must be desirous that the rector of a parish should have the nomination of the curate or officiating clergyman under his control, inasmuch as he can best judge of his fitness for the situation, as well as of his principles and acquirements, and the soundness of the doctrine he may preach; and, generally speaking, I shall always be inclined to support the right of the rector to nominate and appoint a curate, rather than give the right of election to the parishioners at large, or those in vestry assembled. But, at the same time, if there be a custom established by immemorial usage, it must be attended to, because antient

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rights are not to be destroyed by any private wish or individual feeling. But it does not appear to me that the nature of the custom relied on by the plaintiffs to elect their curate, has been so fully investigated as it ought to be. Besides, it is necessary to consider whether the custom proved is conformable with that laid in the declaration. With respect to the entry in the register of visitations, I am strongly inclined to think that it was properly admitted in evidence. A bishop at his visitations is always in the habit of making strict inquiries as to the mode, and by whom the different churches within his diocese are served, and how the curates are appointed, and by whom they are nominated. This he does for his own private information. These visitations, in antient times, were not held at stated periods, but are now held annually. In many dioceses, a bishop sends round printed circulars to all the clergy within his jurisdiction, inquiring how their respective churches are filled, and by whom the officiating ministers are nominated or appointed. Here, the words relied on in the register of 1606 are *juxta consuetudinem*, and we therefore ought clearly to see what was meant by those words; and, for the reason stated by my Lord Chief Justice, I strongly incline to think they refer to an ecclesiastical, rather than a common-law custom. At all events, their meaning is so ambiguous, that I think the case requires a further and strict investigation.

Mr. Justice BURROUGH.—I am quite satisfied that there ought to be a new trial, as the nature of the custom was not satisfactorily proved. I cannot agree with my Lord Chief Justice, and my brother *Park*, that the entry in the register of visitations was receivable in evidence, as it only went to shew the admission of a priest by a *late* rector, many years before the entry was made. At all events, it ought not to have been received as evidence to prove the custom. It does not contain the original admission of the person therein named, nor does it appear that he or the

rector was present at the time, and the words *juxta consuetudinem* are not only ambiguous in themselves, but were not evidence of a particular custom, unless they were shewn to relate to a long established or immemorial custom.

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Mr. Justice GASELEE.—I concur with the Court in thinking that there ought to be a new trial, and as I shall, in all probability, have to try the cause, I shall now refrain from making any observation.

Rule absolute for a new trial.

BUSHNELL and Others v. LEVI.

Wednesday,
 Feb. 4th.

THIS was an action of *assumpsit* for work and labour performed by the plaintiffs in repairing the defendant's chaise.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, the plaintiffs proved the value of the work done for the defendant, in the county of *Middlesex*, and the Jury found a verdict for them for 4*l.* 18*s.*

Mr. Serjeant *Andrews*, on a former day in this Term, obtained a rule *nisi*, that the defendant might be at liberty to enter a suggestion on the roll, under the *London Court of Requests act* (39 & 40 *Geo.* 3, c. civ. s. 5 (a),) in or

and within the jurisdiction of the *London Court of Conscience act*, 39 & 40 *Geo.* 3, c. civ.

An officer of the Sheriff of *Middlesex* kept a lock-up house in that county, where he resided and carried on his business. He also kept an office or counting-house in the city of *London*, where he carried on the business of a Sheriff's officer, in partnership with his son:—*Held*, that he was a person seeking a livelihood or trading or dealing in *London*,

(a) By which it is enacted, that it shall be lawful for any person or persons, whether residing within the city of *London* or elsewhere, who shall have any debt due to him or them, not exceeding 5*l.*

from any person or persons whatsoever, residing or inhabiting within the city of *London*, or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or

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der to deprive the plaintiffs of their costs. He founded his motion on an affidavit, which stated, "that the defendant lived in *Newman Street, Oxford Street*, and that previous to and at the time of the commencement of this suit, and ever since, he had carried on the business of a Sheriff's officer, in *Fetter Lane*, in the city of *London*, under the firm of *William Levi and Son*, and had rented offices, or a counting-house, and premises, jointly with his said son and partner, in *Fetter Lane*, aforesaid, and had sought and endeavoured to get his livelihood within the said city of *London*, by his aforesaid business of Sheriff's officer, in partnership with his son, and that the defendant was liable to be summoned to the Court of Requests there." The learned Serjeant referred to *Tidd's Practice* (a), where all the cases as to the residence of parties, on the construction of this statute, are collected; and, although in *Miller v. Williams* (b), it was held, that, if a party's *residence* be out of the jurisdiction of the Court of Requests for *London*, his occasionally under-writing a policy at *Lloyd's Coffee House*, where he had a seat, was not a seeking his livelihood within the city, so as to subject him to the jurisdiction of the Court, as it must be followed as a trade or business. So, in *Jef-*

trading, or dealing within the same city or liberties, to cause such debtor or debtors, person or persons from whom such debt or debts shall be due and owing, or claimed and demanded, and so resident, inhabiting, or keeping any house, warehouse, shop, &c., &c., or seeking a livelihood, or trading or dealing as aforesaid, to be warned or summoned to appear before the commissioners at *Guildhall*, &c., who, if the debt does not exceed 5*l.*, have power to make order for the payment.

And by the 12th section it is enacted, "that, if any action or suit shall be commenced in any other Court than the said Court of Requests, for any debt not exceeding 5*l.*, and recoverable by virtue of the former acts, or of this act, in the said Court of Requests, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever."

(a) 9th Edit. 955-6.

(b) 5 Esp. Rep. 19.

series v. Watts (a), where the defendant *resided* in *Middlesex*, and kept a warehouse in the city of *London*, jointly with another person, but told the plaintiff that he did not keep the warehouse, and the plaintiff, upon inquiry in the neighbourhood of the warehouse, could obtain no intelligence respecting him, this Court would not exempt the defendant from payment of costs, on the ground that the g under 5l., the defendant ought to have been o the *London Court of Requests*. So, in *Gray* a market-gardener who held, at an annual d with a shed over it, in *Fleet Market*, which l three times a-week, on market-days, till ten e morning, after which, and on all other days, it was occupied by others, was held not to keep a *stand*, within the meaning of the act; and in *Skinner v. Davis (c)*, a person plying as a porter in the city of *London*, and resorting to a house of call there, but not *lodging* in the city, was deemed not to be a person seeking his livelihood in *London*, within the act. So in *Kemsett v. West (d)*, a coal-merchant, who resided and carried on his business at *Lambeth*, in *Surrey*, but kept a counting-house in the city of *London*, for the purpose of receiving orders, was held not to be entitled to the privilege of being sued only in the *London Court of Requests*, as a person seeking his livelihood in the city: yet, in *Croft v. Pitman (e)* a person who rented a counting-house in the city of *London*, jointly with another person, and received orders there for his business, was held to be within the jurisdiction of the *London Court of Requests* act, although he slept and resided in *Southwark*. That case is expressly in point, and is the latest authority, with the exception of *Kemsett v. West*, where *Croft v. Pitman* was not adverted to; and in all the previous deci-

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(a) 1 New Rep. 183.

(b) 8 East, 336.

(c) 2 Taunt. 196.

(d) 5 Dow. & Ryl. 626.

(e) 1 Marsh. 269; S. C. 5 Taunt. 648.

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sions, the defendant had no permanent office or place of business within the city, but only resorted there occasionally; whilst here, it is expressly sworn, that he rented a counting-house in the city of *London*, and sought to get his livelihood there; and although he was in partnership with his son, he is still within the meaning of the act, according to the case of *Croft v. Pitman*.

Mr. Serjeant *Wilde* now shewed cause, on affidavits which stated, that the defendant carried on the business of a Sheriff's officer in partnership with his son, at a lock-up house for the Sheriff of *Middlesex*, in *Newman Street, Oxford Street*, where he *resided*, and that he was rated as the occupier of such house; that process in the city of *London* is served and executed by one of the Serjeants of Mace; that the defendant was not one of those officers; but that he carried on the whole of his business as a Sheriff's officer in the county of *Middlesex*, where the plaintiff's cause of action arose, the chaise having been repaired there. It was also sworn, that the plaintiffs did not know that the defendant had a counting-house or office in *Fetter Lane* at the time the action was brought; and that it was rated in the name of *Lawrence Levi*, the defendant's son. The learned Serjeant submitted, that this case was distinguishable from *Croft v. Pitman*, as there the debt was contracted in *London*, whilst here, as the defendant was not an officer of the Sheriffs of that city, and resided wholly in *Middlesex*, he must be considered as carrying on his business there, although he was in partnership with his son, and occupied an office jointly with him in *Fetter Lane*.

But the Court held, that, as the words of the act extend to persons keeping any shop, shed, stall, or stand, or *seeking a livelihood*, or trading or dealing within the city of *London*; and as Lord Chief Justice *Gibbs* had held, in *Croft*

v. Pitman, that a person renting a shop or stall was within the jurisdiction, although he rented it jointly with another; and Mr. Justice *Dallas* said, that the defendant received orders at his counting-house, and that, if so, he must be said to carry on his business there; and Mr. Justice *Heath* and Mr. Justice *Chambre* concurred: that case must govern the present, particularly as the affidavit is sufficient to bring the defendant within the authority of that decision.

Rule absolute.

GOULD *v.* SHIRLEY.

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THIS was an action of *assumpsit*, and brought to recover from the defendant the sum of 20*l.* and upwards, for goods sold and delivered. Pleas—*First, non assumpsit*; and *secondly, non assumpsit infra sex annos*, on which issues were joined. The defendant paid 3*l.* 5*s.* 4*d.* into Court.

At the trial, before Mr. Justice *Gaselee*, at the last assizes for the county of *Stafford*, it appeared that all the goods were delivered to the defendant previously to and in the year 1820, with the exception of one parcel, supplied on the 26th *December*, 1825, the amount of which, *viz.* 3*l.* 5*s.* 4*d.*, he paid into Court. In order to take the case out of the operation of the statute, the plaintiff's nephew was called as a witness, who said that he had assisted the plaintiff in his business, and that he saw the goods delivered to the defendant; that, in the Spring of 1826, he went to the defendant, and told him that the plaintiff had sent him (the witness) for some money, which he owed, on account; that the defendant said, that he had not got any; that the witness saw him again shortly afterwards, and told him that his uncle (the plaintiff) had shewn him his accounts, and that the amount was more than 20*l.*, but that the defendant made no answer; that, on the witness then urging the defendant to help him to 5*l.*, as

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On the defendant's being applied to for payment of a debt of 20*l.*, barred by the statute of limitations, he said he was going to *H.* in the course of the week, and he would help the plaintiff to 5*l.* if he could:—*Held*, that this was a mere conditional promise, and that it was incumbent on the plaintiff to shew that the defendant was of ability to pay.

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the plaintiff was building, and wanted money very bad; the defendant replied, he was going over to *Hanley*, in the course of the week, and he would help the plaintiff to 5*l.* if he could.

The learned Judge left it to the Jury to say, whether, upon this evidence, there was an acknowledgment of the debt by the defendant, and a promise to pay, and on the plaintiff's counsel submitting that the evidence was insufficient for that purpose, the learned Judge said, that there was at all events an admission of a debt of 5*l.*; and left it to the Jury to consider whether, where a person demands 20*l.*, and there is a promise to pay 5*l.*, it is an admission of the whole. They found that there was an acknowledgment and promise to pay the whole, and gave a verdict for the plaintiff, for 20*l.* 17*s.* 9*d.*, the amount of his demand as proved. Leave, however, was reserved to the defendant to move to enter a nonsuit, or that the verdict might be reduced to 1*l.* 15*s.* 8*d.*, which, with the sum of 5*l.* 5*s.* 4*d.* paid into Court, would amount to 5*l.*; to which alone it was submitted the plaintiff could be entitled.

Mr. Serjeant *Wilde*, in the last Term, accordingly obtained a rule *nisi*, and contended that there was not sufficient proof of an acknowledgment or promise by the defendant to take the case out of the statute; that the promise, if any, was a mere conditional promise, and that, at all events, a conditional promise to pay 5*l.* could not be taken to be an absolute promise to pay 20*l.*, for which the verdict was taken.

Mr. Serjeant *Peake*, now shewed cause.—The question was properly left to the Jury, and there is no ground to disturb their verdict. Although in *Scales v. Jacob* (a), where the defendant, on being called on for payment of a debt, said it was not in his power to pay, but as soon as it

(a) 3 Bing. 638.

was, he would—it was held to be a conditional promise only, and that it was incumbent on the plaintiff to prove the defendant's ability to pay; yet there the Court were equally divided in opinion; and though, in the subsequent case of *Tanner v. Smart* (a), where the defendant said: "I cannot pay the debt at present, but I will pay it as soon as I can," it was held not to be a sufficient acknowledgment to entitle the plaintiff to recover, he not having proved the defendant's ability to pay; yet here, the defendant did not say that he could not pay, but that he would help the plaintiff to 5*l.*, if he could. That, therefore, amounted to an acknowledgment of the whole debt, and a promise to pay 5*l.* in part; and, although the expression may be equivocal in itself, it was properly left to the Jury to say whether it was an admission of the whole debt being due, or a promise to pay part only. In *A'Court v. Cross* (b) the defendant said he would never pay; and although, in *Ayton v. Bolt* (c), where the defendant said he should be happy to pay the debt *if he could*, the Court held, that the case fell within the rule laid down in *A'Court v. Cross*; yet here, the defendant did not deny that the sum of 20*l.* was due to the plaintiff, and he promised to help him to 5*l.*, which was evidence of an acknowledgment of the original debt, and a promise to pay part of it.

Mr. Serjeant *Wilde*, in support of his rule, relied on the case of *Tanner v. Smart*, where the defendant's promise was in terms similar to the present, and the Court took time to consider; and Lord Chief Justice *Tenterden*, in delivering judgment, after referring to the several cases on this disputed point, said (d): "All these cases proceed upon the principle, that, under the ordinary issue on the statute of limitations, an acknowledgment is only evidence

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(a) 6 Barn. & Cress. 603.

(b) 3 Bing. 329.

(c) 4 Bing. 105.

(d) 6 Barn. & Cress. 609.

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of a promise to pay, and unless it is conformable to, and maintains the promises in the declaration, though it may shew to demonstration that the debt has never been paid, and is still subsisting, it has no effect. The question then comes to this: Is there any promise in this case which will support the promises in the declaration? The promises in the declaration are absolute and unconditional, to pay when thereunto afterwards requested. The promise proved was — ‘I’ll pay as soon as I can;’ and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise into one that was absolute and unqualified.” That reasoning is expressly applicable to the present case, and makes the former decisions consistent and intelligible.

Lord Chief Justice BEST.—Where the terms of an acknowledgment of a debt barred by the statute of limitations are ambiguous, their meaning and effect are questions for the Jury; but I am of opinion that what was said by the defendant in this case does not amount to a promise to pay, or even an acknowledgment of the plaintiff’s demand; and, even if it did, it is quite clear that it was merely a conditional promise. The defendant at first said, that he had not got any money, and, on being afterwards applied to for 20*l.*, he made no answer; and, on being requested to help the plaintiff to 5*l.*, he replied, “that he was going to *Hanley* in the course of the week, and that he would help him to 5*l.* if he could.” It was, therefore, incumbent on the plaintiff to shew that the defendant was able to pay that sum. This case, therefore, falls precisely within that of *Tanner v. Smart*, where my Lord *Tenterden*, in a most elaborate judgment, after reviewing all the previous conflicting decisions, arrived at the conclusion, that, in the case of an acknowledgment in terms similar to the present, the plaintiff could not recover without adducing proof of the defendant’s ability to pay.

Mr. Justice PARK.—I am of the same opinion. In *A'Court v. Cross*, the Court thought that the mere acknowledgment of a debt did not amount to a promise to pay; and that, if there were any thing said at the time of the acknowledgment to repel the inference of a promise, the bare acknowledgment would not take the case out of the statute; and, although we were divided in opinion in *Scales v. Jacob*, yet, the grounds on which I came to a different conclusion from my Lord Chief Justice and my brother Gaselee, were the peculiar circumstances of the case, and particularly the time when the promise was made, and I thought that such promise ought to accompany the acknowledgment; and that, if there were a condition annexed, it was incumbent on the party to shew its performance, or the means of doing so. Here, however, what was said by the defendant does not amount to an acknowledgment of the plaintiff's demand, much less a promise to pay even a part of it: he merely said, that he was going to *Hanley* in the course of the week, and that he would help the plaintiff to 5*l.* if he could; and when he was previously informed that the account was 20*l.* and upwards, he made no answer. I therefore think that the rule for entering a nonsuit must be made absolute.

Mr. Justice BURROUGH.—The ground on which I founded my opinion in *Scales v. Jacob* was, that the defendant was sued within six years after his promise, and that, if an action had been commenced on an account stated the day after the promise was made, the acknowledgment would have been sufficient to sustain the action, the debt being an available claim at the time. But this case falls expressly within that of *Tanner v. Smart*, and with which I fully concur.

Mr. Justice GASELEE.—In *Scales v. Jacob* I thought that the promise by the defendant was a conditional promise, and that it ought to have been declared on as such;

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and also that it was a new promise, and not a revival of the old one. Here, I would not nonsuit the plaintiff, but left it to the Jury to say, whether, the defendant having admitted 5*l.* to be due, it amounted to an acknowledgment of the whole of the plaintiff's demand. I was not then aware of the decision of the Court of *King's Bench* in *Tanner v. Smart*, which has laid down a true and correct principle, and by which I feel myself bound to abide.

Rule absolute for a nonsuit.

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Feb. 5th.

ANN TAYLOR and MARY FOLDER, Administratrixes of
SARAH FOLDER, deceased, v. LYON.

The plaintiffs commenced an action against the defendant, as administratrixes.—Pleas, the statute of limitations, and that the plaintiffs were not administratrixes of the deceased, at the time of the commencement of the suit. The letters of administration were not taken out till after the action was brought, and the statute of limitations would have been a bar to a new action. The plaintiffs being surviving partners as well as administratrixes of the deceased, the Court allowed the writ and declaration to be amended by describing them in their former character, on payment of costs by the plaintiffs, and allowing the defendant to plead *de novo*.

A RULE nisi was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, that the plaintiffs might be at liberty to amend the writ and declaration in this cause, either by omitting the representative character of the plaintiffs, or by changing it from administratrixes to surviving partners, or by entitling the declaration of *Hilary Term*, 1828, instead of *Michaelmas Term*, 1827; and that, in the mean time, all further proceedings might be stayed. He founded his motion on an affidavit of the plaintiffs' attorney, which stated, that the action was commenced on the 15th September, 1827, by process out of this Court, returnable on the first return of the *Michaelmas Term* following; that the plaintiffs sought to recover the sum of 500*l.* from the defendant, as the acceptor of certain bills of exchange, drawn on him by, and payable to *Sarah Folder*, who died in *March*, 1825; that the plaintiffs' attorney was instructed to sue the defendant in *December* in that year, but that he was unable to find his address till *September*, 1827; that, before the return of

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the writ, the defendant commenced a suit against the plaintiffs in the Court of *Exchequer*, and obtained a writ of injunction for want of appearance, restraining the plaintiffs from proceeding in this action; and that the injunction was dissolved, upon the merits, at the end of the last *Trinity* Term; that the declaration was intitled generally of *Michaelmas* Term, 1827, and delivered on the first day of that Term; and that the defendant pleaded—*First*, the general issue—*Secondly*, the statute of limitations—and *Lastly*, that the plaintiffs were not administratrixes of *Sarah Folder*, deceased, at the time of the commencement of the suit: upon which the plaintiffs' attorney found, on inquiry, that the letters of administration were not taken out until the 25th *December*, 1827, he having previously thought that they had been granted within a year after the death of the intestate. It was also sworn, that the plaintiffs were the surviving partners, as well as the administratrixes of the deceased; and that the debt in question was contracted in the course of a business carried on in the separate name of *Sarah Folder*, but for the joint benefit of herself and the plaintiffs; and that the plea of the statute of limitations would be fatal to any new action. Under these circumstances, the learned Serjeant submitted, that, as the plaintiffs' attorney sued out the writ in ignorance of the fact that the letters of administration had not then been granted, the plaintiffs were entitled to sue as surviving partners, instead of in their representative character, the cause of action being the same; and he relied on the case of *The Executors of the Duke of Marlborough v. Widmore* (a), where the plaintiffs declared, as executors, on a promise to their testator, and issue having been joined on a plea of the statute of limitations, the Court permitted the plaintiffs to amend, by laying the promise to have been made to themselves.

(a) 2 Str. 890.

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Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie* now shewed cause.—If this amendment were allowed, it would have the effect of giving the plaintiffs an opportunity of commencing a new and different action, to the prejudice of the defendant, and so deprive him of that benefit to which he would have been entitled if the plaintiffs had at first commenced the action in their own right. In the case of *The Executors of the Duke of Marlborough v. Widmore*, the amendment was allowed on the authority of *Bearecroft v. The Hundred of Burnham* (a), where, in an action upon the statute of hue and cry, the allegation of the oath in the declaration was allowed to be amended, by laying it to have been made by the servant instead of by the master. In *Doe d. Hardman v. Pilkington* (b), Mr. Justice *Yates* and Mr. Justice *Aston* cited the case of *The Executors of the Duke of Marlborough v. Widmore*, and said, that it was reported more at large, and rightly taken, in *Fitzgibbon* (c), where the declaration was amended by laying the promise as made to the executors instead of to the testator, because the plaintiffs' action would otherwise have been lost; the statute of limitations having run upon the promise made to the testator. A count on a promise to the plaintiffs as surviving partners, cannot be joined with a count alleging a promise to them as administratrixes, or to their intestate; and although the declaration might be amended by laying a promise to them in their representative character, instead of to their intestate, yet they cannot be allowed to abandon their former action, and commence another in their own right. Besides, in this case there is nothing to amend by, which, as Mr. Justice *Buller* said, in *Green v. Rennet* (d), is a circumstance by which the Courts have always been guided; and, although a writ might be amend-

(a) 3 Lev. 347.

(b) 4 Burr. 2448.

(c) Page 193.

(d) 1 Term Rep. 783.

ed by the *præcipe*, yet there is a wide distinction where the mistake is occasioned by the act of the party, or by the negligence of the clerk; and, as the defendant has pleaded that the plaintiffs were not administratrixes at the time of the commencement of this suit, it is a complete answer to the action, and it is too late for the plaintiffs to seek to amend their own error; especially as the nature of the action will be thereby changed.

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Lord Chief Justice BEST.—We are not always bound to see whether there be any thing to amend by or not. We may order declarations to be amended by striking out unnecessary counts; and we are also empowered to amend previously to verdict, when we see that the justice of the case will be advanced by our so doing. Questions of amendment are purely for the discretion of the Court. Although the plaintiffs' cause of action is founded on a stale demand, the defendant has not alleged that he has been deprived of the testimony of any witness by death or otherwise; and, if he has a good defence to the action, the amendment will be beneficial to him, as he will be entitled to costs, which he would not have been if the plaintiffs had continued their suit in their character of administratrixes.

Mr. Justice PARK.—Amendments are not only in the discretion of the Court, but of a Judge at Chambers, and may be allowed in every stage of the proceedings, until verdict, provided they be in furtherance of justice. In the case of bailable process, in an action against the bail, the pleadings could not be amended by introducing a new and substantive cause of action against them, so as to make them liable, independently of their character as bail. But, by allowing this amendment, we shall prevent expense, and also confer a favour on the defendant, as, if he succeeds, he will obtain his costs.

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Mr. Justice BURROUGH and Mr. Justice GASLEE concurred.

Rule absolute, on payment of costs, the defendant having leave to plead *de novo*.

Friday,
Feb. 6th.

A constable is justified in apprehending a person charged on suspicion of felony, if he have reasonable or probable cause to believe that the party charged is the felon; and it having been left to the Jury to say, whether, on all the facts before them, they thought that the constable had reasonable ground to suppose that the party charged was guilty of felony, and whether they would have acted as the constable did:—*Held*, that this direction was right in substance, and that the constable did not exercise an undue degree of coercion, although he apprehended the party (a female) at night, without any warrant, and conveyed her to prison previously to taking her before a magistrate.

MARY DAVIS v. RUSSELL and two Others.

THIS was an action of trespass for an assault and false imprisonment, brought against the defendant *Russell*, a superintendant of the *Cheltenham* police, and the two other defendants, the one a constable, the other a collector of rates, who acted as the assistants of *Russell*, in taking the plaintiff into custody and conveying her to prison. Plea—Not guilty.

At the trial, before Mr. Justice *Gaslee*, at the last Assizes for the county of *Gloucester*, it appeared, that, in *November*, 1827, the plaintiff, a female in the decline of life, lodged in the house of one *Ann Hammerton*, a milliner at *Cheltenham*, who, in the evening of the 16th of that month, alleged that her house had been robbed, and the plaintiff's trunk, which was in her bed room, and which contained a bank of *England* note for 10*l.*, a promissory note for 7*l.*, and various articles of jewelry and wearing apparel, was taken away; that, some time afterwards, the plaintiff discovered some of her clothes which were in the trunk concealed under a bed in Miss *Hammerton's* room, and several other small articles were found in her possession; that the plaintiff then left Miss *Hammerton's* house, and, on the 5th *January*, 1828, obtained a warrant at the public office at *Cheltenham* to search the house, the plaintiff having previously deposed that she had found some of the articles she had in her trunk in the possession of Miss *Hammerton*; and that the plaintiff had suspected that Miss *H.* had been concerned in taking away the plaintiff's trunk, and robbing her of the articles therein contained. On Miss *Hammerton*

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ton's appearing before the magistrates on the 8th *January*, the defendant *Russell* being present, the charge was dismissed. On *Sunday*, the 27th *January* following, Miss *Hammerton* came to *Russell*, and told him that she had strong grounds for believing that the robbery in her house had been committed by the plaintiff; and she shewed him a letter addressed to the plaintiff, at her house, bearing the *Cheltenham* post-mark; and Miss *H.* said that she had opened the ends of the letter and looked into it, and that, from what she saw, she had good reason to believe that it would lead to a discovery of the thief. The letter was accordingly opened by *Russell*, at her request, when it was found to be dated *London*, *January* 19th, and signed, *Obadiah*, and appeared to be a communication from him as the receiver of the articles alleged to have been stolen from Miss *Hammerton*, and in which he requested the plaintiff to say how they should be disposed of, and requiring her to send him some money, thereby making her a participator in the alleged robbery. Miss *Hammerton* also told the defendant *Russell*, that, a few days after the robbery, a letter had arrived at her house for the plaintiff, in the same hand-writing, bearing the *London* post-mark; and that the plaintiff had refused to shew her its contents, although she had been requested to do so. Upon this, *Russell*, under the impression that the plaintiff had committed the robbery at Miss *Hammerton's* house, called the two other defendants to his assistance, and, at her request, proceeded to a house in *Elm Street, Cheltenham*, where she said the plaintiff was then lodging, and where they arrived between ten and eleven o'clock at night: on their knocking at the door, it was opened to them, and the defendant *Russell*, without producing any warrant, apprehended the plaintiff, took her from her bed, and conveyed her to prison, where she was kept until the next morning, *viz.* the 28th *January*, when she was taken before Mr. *Capper*, a magistrate, by whom the deposition of Miss *Hammerton* was taken, charging the

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plaintiff with the theft, and she was thereupon committed to *Northleach* Bridewell for a further examination, until the 12th *February*, on which day she was again brought up before two magistrates, when Miss *Hammerton* stated that she had intercepted another letter addressed to the plaintiff at Miss *H.*'s house, and which was confirmatory of the other; and the magistrates considering that those letters afforded a strong ground of suspicion against the plaintiff, remanded her for a still further examination, until the 16th *February*, when she was discharged for want of further proof.

At the following Spring Assizes for the county of *Gloucester*, the plaintiff preferred a bill of indictment for larceny against Miss *Hammerton*, who was found guilty of stealing the articles taken from the plaintiff's trunk, and was convicted, and sentenced to seven years transportation; and the day after the trial, she committed suicide in *Gloucester* gaol; and the anonymous letter signed *Obadiah*, as well as the subsequent letter, were proved to have been written by Miss *Hammerton* herself. The learned Judge told the Jury, that, if *Russell*, the constable, on the complaint being made to him by Miss *Hammerton*, believed, or had reasonable ground to suppose, that what she had told him was true, he had a right to take the plaintiff into custody; and he desired the Jury to consider, whether, from the facts proved, coupled with the letter produced by Miss *Hammerton* to *Russell*, and her statement to him, he had reasonable ground to suppose that the plaintiff was implicated in the robbery with which she was charged, and whether, if the Jury had stood in the place of *Russell*, they would have acted as he did; and the learned Judge also intimated an opinion, that, if the Jury thought that there was reasonable ground for *Russell* to suspect that the plaintiff had committed the felony imputed to her, the defendants were entitled to a verdict. The Jury having returned a verdict for them—

Mr. Serjeant *Russell*, in the last Term, obtained a rule nisi that it might be set aside, and a new trial granted, on the grounds,—*First*, of a misdirection by the learned Judge, viz. that the question whether the defendant *Russell* had or had not reasonable or probable cause for apprehending the plaintiff, was a question of law; and he relied on the case of *Hill v. Yates* (a), where, in an action of trespass and false imprisonment, for the apprehension of the plaintiff by the defendants (a constable and his assistant) for wood stealing, Mr. Baron Garrow left it to the Jury to say, whether there was probable cause for the apprehension of the plaintiff, at the same time intimating it as his opinion, that there were sufficient grounds for the defendants' acting as they had done; and, on an application for a new trial, Mr. Justice Dallas said (b): "Since the case of *Sutton v. Johnstone* (c) the question of probable cause is a matter of law, and cannot be left to the Jury."—*Secondly*, although the apprehension of the plaintiff might have been justifiable, the Jury ought to have been directed to consider whether the defendants had not, under the circumstances, acted with an unnecessary degree of violence or coercion, by dragging the plaintiff from her bed at a late hour of the night, there being no reason to induce them to believe that she would attempt to escape, as she was well known in *Cheltenham*, where she had long resided. Besides, the defendants acted without any warrant; and in *Wright v. Court* (d), the Court seemed to intimate, that a constable cannot justify handcuffing a prisoner, except he has attempted to escape, or unless it be necessary, in order to prevent his doing so.

Mr. Serjeant *Ludlow* now shewed cause, and submitted, that the direction of the learned Judge to the Jury was, in

(a) 2 B. Moore, 80; S. C. 8 Taunt. 182.

(b) 2 B. Moore, 82.

(c) 1 Term Rep. 493, 784.

(d) 4 Barn. & Cress. 596; S. C. 6 Dow. & Ryl. 623.

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substance, correct; and although, in *Hill v. Yates*, the Court said that the question of probable cause was a matter of law, yet Mr. Justice *Dallas* said, that it appeared that the learned Judge who tried the cause intimated to the Jury that he thought there was probable cause; that he, therefore, should have nonsuited the plaintiff, and not allowed the case to have gone to the Jury for their verdict. Here, however, the question left was, whether, from the letter produced by Miss *Hammerton* to the constable, coupled with the statement made by her at the time, and the facts proved, the constable *Russell* had reasonable ground to suspect the plaintiff of felony; and that, if he believed the representation made to him by Miss *Hammerton* to be true, he was justified in acting upon it and apprehending the plaintiff. But the case of *Beckwith v. Philby* (a) is an authority expressly in point. There, it was held, that a constable, having reasonable cause to suspect that a felony had been committed, was justified in arresting the party suspected, although it afterwards appeared that no felony had, in point of fact, been committed. There, too, the learned Judge who tried the cause (b) was of opinion that the arrest and detention were lawful, provided the defendants (who were constables) had reasonable cause to suspect that the plaintiff had committed a felony; and he directed the Jury to find a verdict for the defendants, if they thought, upon the whole evidence, that they had reasonable cause for suspecting the plaintiff of felony; and a verdict having been found for the defendants, a motion was afterwards made to enter it for the plaintiff; not because the question had been improperly left to the Jury; but on the ground that a constable had no authority, without a warrant, to apprehend a person, unless there was a charge of felony made by a third person, or unless a felony had been committed: and Lord Chief Justice *Tenterden* said:

(a) 6 Barn. & Cress. 635.

(b) Mr. Justice *Littledale*.

“ Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the Jury, which they have decided against the plaintiff, and, in my judgment, most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a Justice of the Peace, to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas, a constable, having *reasonable ground* to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities. Now, in this case, it is quite clear upon the evidence, and the Jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony; and, the Jury having so found, I am of opinion that the action was not maintainable.”

Although it has been said, that, in this case, it should have been left to the Jury to say whether the defendants had not acted with an unnecessary degree of violence in apprehending the plaintiff and taking her from her bed to prison; yet, she was not handcuffed, neither was any actual force used; and, as she was charged with a felonious offence, which the defendant *Russell* had reasonable ground to suspect that she had been guilty of, he was justified in apprehending her as soon as the charge was made, and the constables were not bound to watch in the street all night. As, therefore, the defendants acted *bonâ fide*, and in the execution of their duty, it cannot be contended for a moment that they were guilty of any

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undue violence, no evidence having been offered to shew it. The learned Serjeant was proceeding with his argument, when the Court called upon—

Mr. Serjeant *Russell* to support his rule.—If the direction of the learned Judge to the Jury be held to be correct, it will not only have the effect of destroying established legal principles, but of overturning several authorities which are expressly in point. The question that was substantially left to them was, whether the constable had reasonable ground to suppose that the plaintiff had been guilty of the felony with which she was charged; and whether, if the Jury had stood in his place, they would have acted as he did. Whether the constable had or had not reasonable or probable cause to apprehend the plaintiff, was a matter of law for the Judge to determine, and not a question for the decision of a Jury. In *Sutton v. Johnstone*, which is a leading case on this subject, Mr. Baron *Eyre*, in delivering the judgment of the Court, said (a): “In our law, justification is a conclusion of law, which necessarily results from a given state of facts;” and in the argument for the defendant in error, in that case, it was said (b), the definition of probable cause is, such conduct in an individual accused, as will warrant a legal and reasonable suspicion of offence against the law, in the mind of the person accusing, so as that a Court can infer a prosecution to have been taken up on public motives. It is a mixed question of fact and law. What circumstances existed, and what knowledge the prosecutor had of them, is a question of fact: but, when the facts are known, and the mind of the prosecutor is laid open to the Jury by evidence, then, whether it were a reasonable or unreasonable cause of proceeding, is a question of law.” That doctrine was assented to by the Court, and Lord *Mansfield* and Lord *Lough-*

(a) 1 Term Rep. 507.

(b) Ib. 529.

borough, in assigning their reasons to the Lord Chancellor, said (a): "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law: and upon this distinction proceeded the case of *Reynolds v. Kennedy* (b)." It is also an universal principle, and long established doctrine, that what is reasonable, is a question of law. Lord *Mansfield*, in treating of what should be a reasonable notice of the dishonour of a bill of exchange, said, in the case of *Tindal v. Brown* (c): "It is extremely clear that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law; it may depend in some measure on facts; such as, the distance at which the parties live from each other, the course of the post, &c. But, wherever a rule can be laid down with respect to this reasonableness; *that* should be decided by the Court, and adhered to by every one for the sake of certainty." So, Lord *Coke*, in treating of tolls, says (d): "What shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the Judges of the law, if it come judicially before them." Again, in the *First Institute* he says (e): "Reasonable time shall be adjudged by the discretion of the Justices before whom the cause dependeth; and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them; for, reasonableness in these cases belongeth to the knowledge of the law, and is therefore to be decided by the Justices." Now, where the liberty of the subject is affected, the question as to what shall

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(a) 1 Term Rep. 545.

(d) 2nd Instit. 222.

(b) 1 Wils. 232.

(e) Co. Litt. 56 b.

(c) 1 Term Rep. 168.

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be a reasonable or probable cause of imprisonment, is of far greater importance than in cases of tolls, fines, or customs; and although it may be said that it only applies to an action on the case, yet, in *Swinton v. Molloy* (a), an action of false imprisonment was brought by the plaintiff, as purser of a man of war, against the defendant, who was his captain; and the latter pleaded a justification, for a supposed breach of duty; but, it appearing in evidence that the defendant had imprisoned the plaintiff for three days, without inquiring into the matter, and had then released him on hearing his defence, Lord Mansfield ruled, that such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him; and his Lordship did not even leave the question to the consideration of the Jury. And in the *Second Institute* it is said (b): "If treason or felony be done, whether the suspicion be just or lawful, shall be determined by the Justices in an action of false imprisonment brought by the party grieved;" and here, if the defendants had pleaded a justification, they must have set forth the facts upon the record, and alleged that they had reasonable cause to suspect that the plaintiff had committed a felony, in consequence of which they had apprehended her: and whether they had such reasonable cause, would be a matter of law for the Judge to determine; for the only question which could be left to the Jury would be, whether certain facts were proved, and not whether they amounted to a justification. The case of *Beckwith v. Philby*, does not apply to the present; and, even if it did, it cannot be reconciled with former decisions. There, however, the learned Judge was of opinion that the arrest and detention were lawful, provided the defendants had reasonable cause to suspect that the plaintiff had committed a felony, and he left it to the Jury to say, *whether they thought, upon the whole*

(a) 1 Term Rep. 537, n.

(b) Page 52.

evidence, that the defendants had reasonable cause for suspecting the plaintiff of felony. Here, however, the whole matter was left entirely to the Jury, which is inconsistent with the decision of this Court in *Hill v. Yates*. The learned Judge who tried this cause should have stated that he thought that the defendants were justified in apprehending the plaintiff, if the Jury should find, upon the facts proved, that they had reasonable cause for suspecting her of felony, and that they had acted *bond fide* upon such suspicion.

Secondly, it should have been left to the Jury to say, whether the defendants had any reason to fear that the plaintiff would escape, or whether they had not acted with an unnecessary degree of violence, in apprehending her, and taking her from her lodging at night. The defendants should either have shewn that the plaintiff attempted to escape, or that it was necessary to take her to prison on the night of her apprehension, in order to prevent it; and her age, and long residence at *Cheltenham*, coupled with the other circumstances proved at the trial, are conclusive to shew that there was no reason to dread an escape. In a case where no felony has been actually committed, a constable can only act on the necessity of the moment, nor can he do more than is actually requisite for the apprehension of the party accused; and he ought not to apprehend a person without a warrant, unless there be strong reason to suspect that the party will attempt to escape, before a warrant can be procured. Although a constable, in the execution of his duty, may have just cause to apprehend a person accused, yet he cannot resort to coercive measures, or do any thing more than is necessary to prevent an escape; and if such a proceeding as the present were tolerated, the most respectable individuals might, upon the bare surmise or unfounded assertion of an unprincipled person, be dragged from their beds at midnight, and immured within the walls of a prison. Lord

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Coke says (a): "One or more Justice or Justices of the Peace cannot make a warrant, upon a bare surmise, to break any man's house to search for a felon or for stolen goods, and it would be full of inconvenience that it should be in the power of any Justice of the Peace, being a Judge of record, *upon a bare suggestion*, to break the house of any person, of what state, quality, or degree soever, and at what time soever, either in the day or night, upon such surmises; but that since the statutes 1 & 2 *Philip and Mary*, c. 13, and 2 & 3 *Philip and Mary*, c. 10, if any person be charged with any manner of felony, and information be given to a Justice of the Peace, of the felony, or suspicion of felony, and he feareth that the King's peace may be broken in apprehending him, the said Justice may make a warrant to the constable of the town to see the King's peace kept in the apprehending and bringing the party charged with, or suspected of, the felony, before him; and the party that giveth the information of his knowledge or suspicion to be present and arrest the delinquent." Great care, therefore, was formerly taken to preserve the public weal, and to secure the liberty of the subject. The power of granting warrants by magistrates, was afterwards extended against persons *suspected of felony*. In *Hale's Pleas of the Crown*, it is said (b): "A Justice of the Peace may issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion;" but, says Lord *Hale* (c), "it is fit, in all cases of warrants for arresting for felony, much more *for suspicion of felony*, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion; for he is in this case a competent

(a) 4th Instit. 177.

(b) Vol. 2, p. 109.

(c) Id. 110.

judge of those circumstances that may induce the granting of a warrant to arrest." But a constable can only act without a warrant, where he fears the escape of the party; and although he may apprehend a person in the case of a felony committed, on the authority of Lord *Hale*, who says (a): "It is not material whether he saw the felony committed, or hath it only by complaint and information; for, as well in one case as the other, he is bound to apprehend the felon, and make search after him within the limits of his jurisdiction, and to raise *hue* and *cry* upon him; and certainly, what may be done upon *hue* and *cry* raised upon a felon, may be done by that constable, who, upon the first complaint, raiseth it." And that, "if there be a felony done, (suppose a robbery upon A.) and A. suspects B., upon probable grounds, to be the felon, and acquaints the constable with it, and desires his aid to apprehend him, the constable may apprehend B. upon this account, though the suspicion arose in A. at first; yet there are to be these circumstances to accompany it:—*First*, A., the person suspecting, ought to be present; for the justification is, that the constable did aid A. in taking the party suspected;—*Secondly*, he ought to inquire and examine the circumstances and causes of the suspicion of A., which, though he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby it may become his suspicion as well as the suspicion of A.; and if the constable should not be allowed this latitude in cases of this nature, many felons would escape." So, Lord *Hale*, in treating of arrest without warrant, says (b): "A constable may, *ex officio*, arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a Justice of the Peace. So, if A. be dangerously hurt, and the common voice is that B. hurt him, or if C. thereupon comes to the constable, and tells him

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(a) Vol. 2, p. 91.

(b) Vol. 1, p. 587.

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that B. hurt him, the constable may imprison him till he knows whether A. dies or lives, or can bring him before a Justice. But if there be only an affray, and not *in view* of the constable, it hath been held he cannot arrest him without a warrant from the Justice." Again (a), "If a constable, *in pursuit* of a felon, requires the aid of I. S., he is bound by law to assist him. Yet, to avoid question in these cases, it is best to obtain the warrant of a Justice, if the time and necessity will permit." It, therefore, follows, either that there must be a *probability* of escape, or that the constable himself *saw* the felony committed, or was in the *actual pursuit* of the felon at the time, in order to justify his apprehending him without a warrant. Although, in *Samuel v. Payne* (b), it was held, that a constable might justify an arrest on a reasonable charge of felony without a warrant, though no felony had been, in point of fact, committed; yet Lord *Mansfield*, at the trial, considered the law to be, that, if no felony had been committed, the apprehension of a person suspected could not be justified by any person. In a note to that case, it is said, that the point had been agitated on a demurrer to a special justification in the *Year-Book*, 7 *Hen.* 4, p. 35, pl. 8, and the Court there seemed to have thought, that, if the cause of suspicion should appear reasonable, the justification would be good; though no felony were committed, but that the case was adjourned. And the case of *Ledwith v. Catchpole* (c) is also referred to; where Mr. Justice *Buller*, in the course of the argument, asked, "if a constable acts on suspicion, must it not, to make it a justification, be a reasonable ground of suspicion in *his own mind*, and *within his own knowledge*, and not merely the information of others; for, if it is not so, he takes upon himself to *judge* of the evidence of others, when he ought to go before a magistrate, who is the proper judge." And Lord *Mansfield*, in giving judg-

(a) Vol. 1, p. 588-9.

(b) 1 Doug. 358.

(c) B. R. East, 23 G. 3, Cald. 291.

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ment said: "Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if, under *probable cause*, an arrest could not be made; and felons are usually taken up upon descriptions in advertisements." His Lordship, therefore, seemed to form his opinion on the probability of an escape, as the words, "probable cause," cannot be taken to refer merely to a probable cause of suspicion, but a probable cause to dread an escape of the party, if the officer had not apprehended him. There, too, a felony had been actually committed, and the constable acted *bonâ fide*, and in *pursuit* of the offender, upon such information as amounted to a reasonable and probable ground of suspicion. In the case in the *Year-Book (a)*, an action of trespass and false imprisonment was brought against a bailiff, and he pleaded, by way of justification, that certain persons came to him in *London*, and told him that the plaintiff and another were coming to *London* with certain oxen, which seemed to them to have been stolen; upon which he went to the plaintiff and the other person, and found the oxen in *an obscure place* in a house; and that he thereupon arrested the plaintiff by reason of the suspicion. There, however, as the plaintiff was a stranger in *London*, and the cattle were in a place of concealment, there was every reason to apprehend the escape of the parties; but, if a constable can be deemed justified in apprehending and imprisoning a party without a warrant, on his own mere suspicion, where he has no reason to dread an escape, and may easily procure the warrant of a magistrate, it would not only be subversive of long established principles, but tend to infringe on the liberty of the subject; for, if a constable or other officer may apprehend another on *mere suspicion*, every imprisonment on a

(a) 7 Hen. 4.

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charge of felony, although wholly unfounded, may be justified.

Lord Chief Justice Best.—This was an action of trespass, for an assault and false imprisonment. The defendant, *Russell*, was a constable, or superintendant of the police at *Cheltenham*, and the two others acted in his aid and assistance as such constable; and he gave in evidence, under the general issue, strong circumstances to shew, that he had reasonable and probable grounds for causing the plaintiff to be apprehended and imprisoned, from the facts disclosed to him by Miss *Hammerton*. The Jury having found a verdict for the defendants, a motion has been made for a new trial, on two grounds—*First*, on a supposed mis-direction of the learned Judge to the Jury; and *Secondly*, an omission on his part to leave it to them to consider whether the defendants were, under the circumstances, justified in treating the plaintiff in the manner they did. *First*, as to the mis-direction, it has been said that it was improperly left to the Jury to say whether the constable had or had not reasonable and probable cause for apprehending the plaintiff. Probable cause is, no doubt, a question of law, and within the province of a Judge to decide; but the Jury must not only first find the facts which are supposed to constitute the probable cause, but they are also warranted in forming their conclusion from those facts; and it is frequently difficult to draw the line between matter of law and matter of fact; and probable cause has been truly said to be a mixed question of law and fact. It has been insisted, that, if even the Jury had intimated their belief of the facts, as they did not amount to probable cause, the plaintiff should have been nonsuited; but I am clearly of opinion, that, under the facts as proved, the learned Judge could not possibly have directed a nonsuit. It was necessary to leave it to the Jury to say, whether or not they believed

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the facts before them; and if they did, whether they concluded from those facts, that the constable had acted honestly, or as they themselves would have done. If he had not, or if he had acted under a mere pretence, or harshly or arbitrarily, without giving credit to the statement made to him by Miss *Hammerton*, the verdict should have been against the defendants, with heavy damages. But my brother *Gaselee*, in substance, left it to the Jury to say, that if they believed all the facts proved, and from thence inferred that the constable was acting honestly and fairly, and in such a manner as they, under such circumstances, would have done, the defendants were entitled to a verdict. This was, in reality, telling them, that, in his opinion, the facts before them, if believed, furnished a probable cause for the defendants' conduct. If the direction of a Judge to a Jury be right *in substance*, a mere inaccuracy of expression, or general remark, must not be considered as a mis-direction, so as to make it a ground for an application to the Court for a new trial. But it has been said, that a constable has no right, on a mere suspicion, to apprehend a person on a charge of felony, without a warrant from a magistrate. That, however, is not so. A distinction has long since been taken in the law, between common persons, and those who are armed with authority, and which they are bound to exercise in the execution of their duty. Although a private individual cannot arrest another on a bare suspicion of felony, unless he can shew a felony actually committed, yet a constable may do so; for, if the latter have *reason to suspect* that a felony has been committed, it is sufficient to justify him. This has been decided so frequently, that it is unnecessary to refer to cases on the subject. Had, then, the constable in this case, reason to suppose that a felony had been committed, and by whom? Miss *Hammerton* told him that she had lost her property, and that the plaintiff had robbed her; that the plaintiff had an opportunity of robbing her whilst she lodged in her house; and that her suspicions were con-

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firmed by an anonymous letter, which she gave to the constable, desiring him to open it, which he did in her presence. He had then no means of knowing that the letter was fabricated, or written by Miss *Hammerton* herself. He, of course, thought that it came from *London*, where it was dated; and the contents of the letter, if genuine, would justify him in apprehending the plaintiff on a suspicion of felony. The letter, as well as all the other facts attending it, were submitted to the consideration of the Jury, and they were desired to say, whether, from the whole of what they had heard, the defendant, *Russell*, had reasonable grounds to suspect the plaintiff of felony, so as to justify him in apprehending her in his character of constable. The *Fourth Institute* (a) has been referred to, for the purpose of shewing that a constable cannot arrest upon suspicion, even under the warrant of a magistrate. But it is there said, that "one or more Justices of the Peace cannot make a warrant, upon a *bare surmise*, to break any man's house, to search for a felon or for stolen goods; and that it would be full of inconvenience that it should be in the power of any Justice of the Peace, being a Judge of record, upon a *bare suggestion*, to break the house of any person upon such surmises." A *bare surmise* or *suggestion*, differs widely from a case where there is a reasonable ground for suspecting that a party has been guilty of felony: and Lord *Coke* refers to the *Year-Book* 13 *Edw.* 4, fol. 9, where it was held, that, for felony, or suspicion of felony, a man might break the house to take the felon, because it was for the common weal, and because the King had an interest in the felony.—The authority of Lord *Hale*, to which we have been referred, appears to me to be against the position for which it was cited. It is there said (b): "A constable may, *ex officio*, arrest a breaker of the peace in his view, without any warrant, and keep him in his house, or in the stocks, till

(a) Page 177.

(b) Vol. 1, 587.

he bring him before a Justice of the Peace. So, if a felony be committed, and A. acquaints him that B. did it, the constable may take him and imprison him, at least, till he can bring him before some Justice of the Peace. But that, if there be only an affray, and not in view of the constable, it hath been held, he cannot arrest him without a warrant from the Justice; but it seems he may, to bring the offender before a Justice, though not compellable."

Again, Lord *Hale* says: "If there be a felony done, (suppose a robbery upon A.), and A. suspects B., upon probable grounds, to be the felon, and acquaints the constable with it, and desires his aid to apprehend him; in this case, I say, the constable may apprehend B. upon this account, though the suspicion arises in A. at first."

The case of *Samuel v. Payne*, is an express authority to shew, that a constable and his assistants may justify an arrest on a reasonable charge of felony, without a warrant, although no felony had in fact been committed. And here, Miss *Hammerton* not only charged the plaintiff with felony, but said, that she had every reason to suspect that she had robbed her, and stated the grounds for such suspicion; and, on these facts, coupled with the letter produced by her to the constable at the time, the Jury found that he had reasonable and probable grounds to apprehend the plaintiff.

Secondly, it has been said, that it should have been left to the Jury to say, whether, under the circumstances, the constable had not exercised an undue degree of violence or coercion; and it has been insisted, in support of that position, that he had no right to apprehend the plaintiff at the hour of night he did: and that even if he had, he could not be justified in taking her from her bed, and compelling her to go to prison. But what was the constable to do? When the charge was made to him by Miss *Hammerton*, he was bound immediately to go to the house where the plaintiff was living; and, if he had not done

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so, he would be responsible for a breach of duty. A direct charge was made by Miss *Hammerton* against the plaintiff, and on which the constable was bound to act, and he had not time to exercise his own discretion. Besides, he not only heard the charge, but was shewn the anonymous letter in support of it, which directly accused the plaintiff of being a participator in the robbery; and, on Miss *Hammerton's* shewing him where the plaintiff then resided, he was not bound to stay at the door of the house all night, nor to watch all the doors and windows to prevent the possibility of an escape. It was proved, that he used no unnecessary violence, and on the door being opened to him, he was bound to apprehend the party accused. The case certainly has raised questions of considerable importance, not only to constables, but to the public at large, and it has been most fully and ably argued. It is important to constables, as they ought to know the extent of their authority, but that they must not exceed or abuse it; and to the public, that constables or other officers should not be interrupted in the due discharge of their duty. Courts of justice will never countenance acts of ill usage, or unnecessary violence or restraint; but we ought not to support the idea, that a constable is not justified in entering a house at night, to apprehend a person, not only suspected, but directly charged with felony. A party is not to be decoyed out of a house by unfair means, or to be treated with cruelty or severity after his apprehension, but it is necessary, when a constable has once apprehended him, to keep his person secure. I much regret the inconvenience and sufferings the plaintiff has sustained, as there can be no doubt of her innocence; but they were occasioned by the wickedness of Miss *Hammerton*, of whom the constable and his assistants were the innocent instruments; and I am, therefore, of opinion, that the rule for a new trial must be discharged.

Mr. Justice PARK.—I, also, am extremely sorry for the situation in which the plaintiff has been placed by the iniquitous conduct of her accuser; but we must administer justice to all, equally and impartially, and divest our minds of any hardship to which a party may have been unjustly put. I do not seek to impeach any of the authorities to which we have been referred, in the able argument of my brother *Russell*; and, although I admit that the question of reasonable or probable cause, is a question of law for the Judge, yet it must be necessarily compounded of facts on which the Jury must decide; and it has been my constant practice, in cases of this description, to leave it to the Jury to say, whether they believe the facts, as proved, to be true; and, if they do, I tell them that I think that they amount to a reasonable and probable cause to justify the party for the act done. So here, my brother *Gaselee* left it to the Jury, in substance, to say, whether they believed, on the whole of the facts before them, that the constable had reasonable ground to suppose that the plaintiff had been guilty of felony, so as to justify his apprehending and taking her to a place of custody. In *Hill v. Yates*, the learned Judge left it to the Jury to say, whether there was probable cause for the apprehension of the plaintiff; but, at the same time, intimated it as his opinion, that there were sufficient grounds for the defendants (a constable and his assistant), to act as they had done. But he should have told the Jury, that, if they believed the facts adduced in evidence for the defendants, they, in his opinion, would amount to a probable cause. But my brother *Gaselee* left this case to the Jury, in substance, in the same terms as my brother *Littledale* did in *Beckwith v. Philby*, where he directed them to find a verdict for the defendants, *if they thought, upon the whole evidence*, that the defendants had reasonable cause for suspecting the plaintiff of felony; but he had, at first, intimated an opinion, that the arrest and detention were lawful, provided the defendants had reasonable

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cause for such suspicion. And Lord *Tenterden*, on motion for a new trial, said, "whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the Jury. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a Justice of the Peace, to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas, a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities." There, as here, the direction to the Jury was tantamount to this, *viz.* that, if they thought the defendants had acted *bonâ fide*, the Judge was of opinion that they had probable cause for the step they had taken. I fully concur with my Lord Chief Justice, in thinking, that if the direction of a Judge to a Jury be right in substance, and the verdict be consistent with it, such verdict ought not to be disturbed.

But it has been said, that the constable was not warranted in acting as he did, in going to the house where the plaintiff lived, at night, and taking her from her bed to prison, unless he had reason to dread an escape; but, if a constable be informed that a felony has been actually committed, and that the suspected party is residing in a particular house, although such person might be a man of property or consequence, yet it is the duty of the constable to repair immediately to the house, and not to stay outside the door all night, or even in the room, after the party is apprehended. The committal of the plaintiff by the magis-

trate, on the following morning, affords a strong presumption that the constable acted *bond fide*; and as she was directly charged with having committed a felony, he had some reason to fear an escape, and he was, therefore, justified in apprehending the plaintiff, and imprisoning her till he could bring her before a magistrate, according to the authority of Lord *Hale*; for Miss *Hammerton* not only told the defendant, *Russell*, that a felony had been committed, but that she had every reason to believe that the plaintiff was concerned in the robbery; and she produced a letter, to shew that her suspicions were well founded.

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Mr. Justice BURROUGH.—Whenever a direct charge of felony is made to a constable, he is bound to act upon it immediately, and he has a right to apprehend the party accused, and keep him in custody, if he has any reason to fear an escape, and the charge itself is sufficient to raise such an apprehension. Although the constable and his assistants might protect themselves under the plea of the general issue, yet, if they had pleaded a justification, stating that a felony had been committed, and that they had been informed of it; that the plaintiff was living in the house where the alleged trespass was committed, and that the defendants, as constables, had good reason to suspect that the felony was committed by her, it would be a good defence to this action. The information given to the constable by Miss *Hammerton*, that she had reason to suspect the plaintiff, as she lodged at her house at the time of the alleged robbery, added to the terms of the letter, which were corroborative of that fact, were sufficient to create a strong suspicion in the mind of the constable; and she further desired him to take the plaintiff into custody, and shewed him where she resided; and he accordingly did so: and if he supposed, at the time, that the statement made by Miss *Hammerton* was true, he was fully warranted in acting as he did. The subsequent convic-

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tion of that woman has raised the main difficulty in this case; but the question is, on what grounds did the constable act at the time of the apprehension of the plaintiff. I think he acted rightly, and in the due execution of his duty, as he had every reason to believe that the plaintiff had committed a felony; and, on a charge of that nature being made, he had cause to fear an escape; and when he had apprehended the plaintiff, it was his duty to take her to a place of security, previously to the charge being heard before a magistrate.

Mr. Justice GASELEE.—As the Court think that this verdict ought not to be disturbed, I not only agree with them, but, on reviewing all that has been urged for the plaintiff, I still entertain the same opinion I formed at the trial. I felt much anxiety for the plaintiff, as I thought it a very hard case upon her. I do not recollect all my expressions to the Jury, but I stated to them, in substance, that if they believed all the facts adduced on the part of the defendants, and would have acted as they did if they were placed in their situation, they amounted to a probable cause to justify the apprehension of the plaintiff. I certainly did not mean to leave the question of probable cause to them, as I had the case of *Beckwith v. Philby* before me; and notwithstanding I was requested to nonsuit the plaintiff, I thought that I ought not to do so, although I have sometimes acquiesced in so doing, after the defendants' case had been gone through; but, when there is any doubt as to the facts, they must be found by the Jury. Here, the plaintiff's *prima facie* case was contradicted by the facts proved for the defendants; and, as they appeared to me to be of a complicated nature, I left it to the Jury to determine, whether, after all they had heard, they thought that the defendant, *Russell*, had reasonable cause for suspecting the plaintiff of felony; and also, whether he and his assistants had acted *bona fide* in apprehending and de-

taining her; and that, if they were satisfied on those points, I thought they were entitled to a verdict; and, as to the *bona fides* of the transaction, I asked them whether, under the circumstances, they would have acted as the constable did, on his receiving the information from Miss *Hammerton*. With regard to the objection, that the defendants exercised an uncalled-for degree of coercion, although it is a most important question, we have been referred to no authority which goes the length of saying, that a constable cannot detain, or take to a place of safe custody, a party whom he has apprehended on suspicion of felony, unless he has reason to fear an escape.

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Rule discharged.

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Friday,
 Feb. 6th.

THIS was an action of trespass and false imprisonment, and brought against the defendant for assaulting the plaintiff, and taking him into custody, and carrying him before a magistrate. The damages were laid at 500*l*. Plea—Not guilty. At the trial, before Mr. Justice *Holroyd*, at *Bury St. Edmunds*, at the last Assizes for the county of *Suffolk*, it appeared that, on the 16th *January*, 1828, the plaintiff, (a surveyor), being employed in directing workmen, with a number of teams or waggons, in cutting up turf, and carting and spreading beach, shingle, and gravel, for the purpose of forming a road, thirteen feet in width, over certain common or town lands, in the parish of *Walbers-*

The plaintiff, a surveyor, being occupied in cutting up turf, and laying down materials for making a road over common lands belonging to a township; the defendant, as *sen-reeve*, or person having the care of such lands, asked the plaintiff by whose authority he was employed; to which the plaintiff replied, that he was ordered to make

the road by a magistrate: that the defendant then told the plaintiff, that, if he did not desist, he should consider him as a wilful trespasser; and as the plaintiff still continued the work, and did not shew any order or warrant authorizing him to make the road, the defendant caused him to be apprehended by a constable, and took him before a magistrate, who refused to receive the complaint; on which the plaintiff brought trespass against the defendant for an assault and false imprisonment:—*Held*, that the latter was entitled to notice of action, under the 7 & 8 *Geo. 4*, c. 30, s. 41, as he had reason to suppose that he was acting under colour of that statute, in causing the plaintiff to be apprehended, although he was not in fact committing a wilful or malicious injury at the time.

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wick in the county of *Suffolk*; the defendant, as the *sen-reeve*, or person employed by the township to take care of the lands, and to make entries of cattle depastured thereon, and to receive the monies paid for them, and generally to do all acts connected with the town property; asked the plaintiff, by the desire of the commoners, by whose authority he was employed: to which he answered, he was ordered to make up the road by a magistrate; the defendant then said, that the plaintiff had no business upon the land, and desired him to leave off working there, and that, if he did not, he should consider him as a wilful trespasser; and as the plaintiff did not shew the defendant any warrant or other authority from the magistrate for his so acting, the defendant ordered a constable to take him into custody; and the same day took him before a magistrate, who refused to receive the complaint, and ordered the plaintiff to be discharged; on which the present action was commenced. It also appeared that the defendant thought he was justified in acting as he did, and that he was not actuated by any ill will or malicious feeling towards the plaintiff; and it was contended for the former, that he was justified in causing the plaintiff to be apprehended under the act for consolidating and amending the laws relating to malicious injuries to property, *viz.* the 7 & 8 *Geo.* 4, c. 30, s. 28 (a), as he was acting as the servant, or under the authority of the commoners, who might be considered as the owners of the property in question. The Jury, under the direction of the learned Judge, who

(a) By which, for the more effectual apprehension of all offenders against the act, it is enacted, "that any person found committing any offence against the act, whether the same be punishable upon indictment or upon summary conviction, may be imme-

diately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring Justice of the Peace, to be dealt with according to law."

stated, that they must give a reasonable compensation, malice being out of the question, found a verdict for the plaintiff, damages twenty shillings; leave being reserved to the defendant to move to set it aside, and that a nonsuit might be entered instead thereof, in case the Court should be of opinion, that the plaintiff was, under the circumstances, doing a wilful or malicious injury, within the intent and meaning of the 24th section of the statute (a).

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Mr. Serjeant *Wilde*, in the last Term, accordingly obtained a rule *nisi*: *First*, on the ground that the defendant was justified in arresting the plaintiff under the 28th section of the statute, as he was committing an offence within its meaning; and *secondly*, that the defendant was, at all events, entitled to a notice of action, under the 41st section of the act (b).

(a) By which it is enacted, "that if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person being convicted thereof before a Justice of the Peace, shall forfeit and pay such sum of money as shall appear to the Justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l*."—And the 25th section enacts, that every punishment and forfeiture by the act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction,

shall equally apply and be enforced, whether the offence shall be committed *from malice conceived* against the owner of the property, in respect of which it shall be committed, or otherwise."

(b) By which, for the protection of persons acting in the execution of the act, it is enacted, "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of the act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant, one calendar month at least before the commencement of the action; and,

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Mr. Serjeant *Storks* and Mr. Serjeant *Bompas* now shewed cause. Unless the plaintiff were manifestly doing a wilful or malicious injury at the time of the act complained of, there is no pretence for saying, that the defendant could have any colour for apprehending him by virtue of the statute, 7 & 8 Geo. 4; and as the plaintiff was acting under the supposed authority of a magistrate, he cannot be considered as a person falling within either of the provisions of that act. Although the defendant might have considered himself justified in apprehending the plaintiff under the 28th section, yet, the proviso in the 24th is a complete answer, by which it is expressly provided, that "nothing in the act contained shall extend to any case, where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of." If so, no notice of action to the defendant could have been necessary under the 41st section, which requires such notice to be given in actions to be commenced against any person *for any thing done in pursuance of the act*; and, as the plaintiff had a fair and reasonable ground to suppose that he had a right to make the road under the authority of the magistrate, his apprehension by the defendant could not be justified, although the latter might have thought that he was authorized in so doing. The apprehending the plaintiff was not even under colour of the Act, much less in pursuance of it; and as he could not have been aware that he had been guilty of an offence within it, the defendant cannot be entitled to its protection, as he did not act in discharge of his public duty as *fen-reeve*, or within the scope of his authority as such; and even if he did, he cannot be considered as the servant of the owner of the property in-

in any such action, the defendant may plead the general issue, and give the act and the special mat-

ter in evidence at any trial to be had thereupon."

jured, as he was the mere agent of the townsmen, having a right of common over the lands in question; and he did not act himself, but directed a constable to take the plaintiff into custody; and although he told him that he should consider him as a wilful trespasser, there was no evidence that he charged him as such before the magistrate; and therefore the plaintiff could not suppose that the defendant was entitled to a notice of action, under a statute of which he had no knowledge. This case can scarcely be distinguished in principle from that of *Cook v. Leonard* (a), which was an action for an assault and false imprisonment; and it appeared at the trial, that the defendants, (the one a constable, and the other a surveyor to commissioners under a local act for paving, lighting and improving the town of *Stroud*), had authority to apprehend all vagrants, and idle and disorderly persons, who should be found wandering or misbehaving themselves *during the hours of keeping watch* within the limits of the town:—and it was by the act declared, that no plaintiff should recover in any action commenced against any person *for any thing done in execution of or under authority of the act*, unless notice in writing should be previously given to the person intended to be sued, twenty-eight days before such action should be commenced;” and as the defendants attempted, at five o’clock in *the day time*, to take a dromedary out of a stable, which two foreigners had been exhibiting in the town, and the plaintiff, who was present, told one of them that the constables had no authority to order him to take the dromedary out of the town; upon which one of the defendants took hold of the halter in order to remove the dromedary; and on the plaintiff’s attempting to prevent him, the defendants assaulted the plaintiff, and imprisoned him; it was held, that as the attempt to seize the dromedary was not made dur-

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(a) 6 Barn. & Cress. 351.

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ing the hours of watch, and the constables did not attempt to apprehend the owner, but the animal itself, the constables were not entitled to the notice of action given by the act, as such notice could only be necessary in those cases in which the party against whom the action was brought, had reasonable ground for supposing that the thing done by him was done in execution of or under the authority of the act; and Mr. Justice *Bayley*, after citing the cases of *Weller v. Toke* (a), and *Bird v. Gunston* (b), in order to shew that magistrates acting beyond the limits of their authority have been held to be within the protection of particular statutes entitling them to notice of action, said, "These cases fall within the general rule applicable to this subject, viz. that, where an act of Parliament requires notice before action brought, in respect of any thing done in pursuance, or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of Parliament, but extend to all acts done *bond fide*, which may reasonably be supposed to be done in pursuance of the act. But, where there is no colour for supposing that the act done is authorized, then notice of action is not necessary." And, after citing the cases of *Lawton v. Miller* (c), and *Morgan v. Palmer* (d), and applying the principles deducible from those cases to that before him, that learned Judge concluded, by saying, "where an act of Parliament says, that, in the case of an action brought against any person for any thing done in pursuance or in execution of the act, the defendant shall be entitled to certain privileges; the meaning is, that the act done must be of that nature and description that the party doing it may reasonably suppose that the act of Parliament gave him authority to do it. I think, that, in this case, the defendants had no reasonable grounds for thinking that the

(a) 9 East, 364.

(b) 24 Geo. 3.

(c) E. T. 1318. MS.

(d) 2 Barn. & Cress. 729.

act of Parliament gave to them, or to the commissioners under whose authority they acted, any power to remove the dromedary from the place where it was, at the time when they attempted to remove it; and that being so, I am of opinion, that the rule for a new trial must be made absolute." And Mr. Justice *Holroyd* said: "In order to entitle the defendant to notice, they ought to have had a colourable authority for removing the dromedary." So, here, the defendant ought at least to have had a colourable authority for apprehending the plaintiff; and, as he cannot be considered as doing a wilful or malicious injury at the time, or committing an offence within the terms of the statute, the defendant could not be entitled to notice; and more particularly so, as the plaintiff supposed he was justified in making the road, as he expressly told the defendant that he had the order of a magistrate to do so. The 41st section is, at all events, controlled by the proviso in the 24th; and in *Looker v. Halcomb* (a), which was an action of trespass for an assault and false imprisonment; and the plea was, that the plaintiff was *wilfully* breaking down the defendant's fences, wherefore he apprehended the plaintiff, and took him before a magistrate; and the plaintiff replied, that he broke the fences in the *bona fide* assertion of a right of way; and the plea was framed with a view to bring the defendant's case within the malicious trespass act, (1 Geo. 4, c. 56), which is repealed by the statute 7 & 8 Geo. 4, c. 30, Lord Chief Justice *Best* said (b): "An act of Parliament, which takes away the right of trial by Jury, and abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act. If the Courts were to decide upon a different principle, the law which has been the subject of discussion this day, would become an intolerable griev-

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(a) 4 Bing. 183.

(b) Id. 188-9.

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ance, placing the liberty of the subject in the hands of any owner of property who might think himself aggrieved by a claim of right. The statute can only apply to cases where a party enters, having no colour, and *knowing* he has no colour of right to enter." Here, however, the plaintiff thought that he was, by the order of the magistrate, authorized in acting as he did.

Mr. Serjeant *Wilde*, in support of his rule.—Under the circumstances of this case, it is quite clear, that the defendant, at the time he caused the plaintiff to be apprehended, supposed that he was fully justified in so doing, and that he was acting *bonâ fide* under the authority of the statute in question; as he told the plaintiff, that, if he did not desist from working, he should consider him as a *wilful trespasser*. Besides, the defendant, as *fen-reeve*, had the care of the town lands, he therefore stood in the situation of a public officer, and it was his duty, as such, to prevent all injuries and encroachments on the lands; and as the plaintiff was found in the act of doing an immediate injury on a part of such lands, by cutting up turf, and making a road; and as he did not shew the defendant any order or authority under which he acted, or which might justify the committing the trespass complained of, the defendant was fully warranted in supposing that he was acting maliciously, or at least wilfully: and the words of the statute are in the alternative; for, if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, it falls within the 24th section of the act. The defendant, therefore, supposing that he was authorized to take the plaintiff before a magistrate, in pursuance of the act, was entitled to notice of action within the 41st section, although the magistrate dismissed the complaint, and discharged the plaintiff on his being brought before him. The question then is, whether the defendant,

having a special duty to perform, thought that he was acting *bond fide*, and under the supposition that the plaintiff was wilfully committing a damage or injury upon the land over which he had the care. If so, he was clearly entitled to notice; for, where a statute gives protection to persons acting in execution, or in pursuance of it, all those who act under its provisions are entitled to that protection, although they exceed their authority by so doing; and, if the defendant acted under colour of the authority of the act, but had overstepped his authority, he would be entitled to notice of action, although the plaintiff might not have been committing a wilful or malicious injury, or doing any act which would bring him within the terms or meaning of the statute. In *Gaby v. The Wilts and Berks Canal Company* (a), a proviso in a local act of Parliament, that all actions should be brought against any person or persons for any thing to be done by him or them in pursuance of the act, or in the execution of the powers and authorities therein given, within six calendar months next after the fact committed, was held to extend to a case where the parties did an act within the limits of their official authority, but exercised that authority improperly, believing at the time that they were acting within it; and Lord *Ellenborough* said: "We are called upon to put a general construction on the terms of this act of Parliament, and to say whether the thing done by the company can be considered as so far done in pursuance of the act, or in execution of its powers and authorities, as to be within the limited protection of the act, though what has been done by them is not borne out in its full legality by the course that they have pursued. The way in which the statute 24 Geo. 2, c. 44, was construed by Lord *Kenyon* (b), seems to have been much like the construction we are

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(a) 3 Mau. & Selw. 580.

(b) See *Alcock v. Andrews*, 2 Esp. Rep. 542.

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now giving to this act; for he thought that, if a person does an act within the limits of his official authority, but exercises that authority improperly, or abuses the discretion placed in him, *eatenus* the statute extends." And Mr. Justice *Le Blanc* said: "The question is not, to what extent the company have offended, nor whether they have done the act in such a manner as to clothe themselves with the character of persons conforming in all respects to the authority given them by the act, but whether they have done this wilfully and maliciously? If they did it *bond fide*, they will be protected as to the time of commencing the action;" and Mr. Justice *Bayley* added, "The question seems to come to this, whether the company were acting *bond fide*? for, if they were not so acting, they are not brought within the protection of the act." So, here, the only question is, whether the defendant acted *bond fide*, in causing the plaintiff to be apprehended, on the supposition that he was doing a wilful or malicious injury to the land over which the defendant had the superintendence and care; and, although he might have been mistaken in thinking that the plaintiff was committing a trespass of such a nature as would bring him within the terms of the statute, yet the defendant was entitled to the notice of action thereby prescribed.

Mr. Justice PARK (a).—I am of opinion, that, under the circumstances of this case, the defendant was entitled to notice of action. If he had been acting legally, he would not have required the protection of the statute by which the notice is given. He meant to act in his character of *fen-reeve*, and, as such, must be considered as a public officer; and, if he exceeded his authority, or made a mistake, still, if he had reason to suppose that he was acting

(a) Lord Chief Justice *Best* was at Chambers.

in pursuance of the statute, he is entitled to the protection which the law intended to throw round him. The act in question has been improperly termed the petty trespass act, but it applies to malicious injuries of the highest description, *viz.* the setting fire to churches or coal mines, and the destruction of machinery used in the manufacturing of silk, or for agricultural or other purposes. The language of the statute is immaterial; and although the act done by the plaintiff was not an offence within its meaning, yet if the defendant thought that he was acting *bonâ fide* and under colour of the act, he ought to have had the notice of action required by the 41st section, according to the principle established in the case of *Goby v. The Wilts and Berks Canal Company*.

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Mr. Justice BARNES.—There can be no doubt but that the defendant acted beyond the provisions of the statute; yet it is equally clear that he supposed that he was acting under it, as he told the plaintiff, that, if he did not desist from working, he should consider him a wilful trespasser: and the defendant was to judge whether the plaintiff were committing an offence which would justify his immediate apprehension; and if he thought he was, he is entitled to the protection of the statute, and the notice of action required by it. In *Bolton v. Boldero*, the defendant, a Justice of the Peace, having called his coachman or groom into the parlour, ordered him to saddle a horse for his daughter; and on the servant's saying he would be damned if he did, the magistrate directed a warrant to be made out against him, under which he was committed; and the groom having brought an action against his master for false imprisonment, but laid the venue in the county where the prison was situate, he was nonsuited; it being held by Lord *Mansfield*, that the defendant, having supposed that he had a right to commit, was entitled to be sued as a magistrate, and, consequently, that the action

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should have been brought in the county where the alleged act was committed (*a*), although he had acted without jurisdiction. Here, if the defendant had acted legally, he would not have required the protection of the act; and if he acted *bonâ fide* and under colour of its authority, he was entitled to the notice thereby required; and I think there can be no doubt but that he supposed he was acting under the authority of the act, when he caused the plaintiff to be apprehended.

Mr. Justice GASELEE.—If the defendant could have justified the act complained of by the plaintiff, he would not have required the protection of the statute; and it appears to me to be quite clear, that he supposed that he was acting under the act. This case, therefore, is distinguishable from that of *Cook v. Leonard*, as there the defendants had no colour under the act of Parliament for seizing the dromedary in the day-time, it not being during the hours of watch; but here, I cannot say that the defendant had no colour for supposing that he was not justified in apprehending the plaintiff, or that he did not think that he was proceeding under the authority of the statute. The rule for entering a nonsuit must, therefore, be made—

Absolute.

(*a*) See the statute 21 Jac. 1, c. 12, s. 5.

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Saturday,
Feb. 7th.

ALCOCK v. COOKE.

THIS was an action of trover, for a bowsprit. Plea—Not guilty. At the trial, before Lord Chief Justice *Best*, at the last Assizes at *Lincoln*, the plaintiff claimed the bowsprit by virtue of a right to take wreck of vessels cast on shore in the parish of *Sutton in the Marsh*, in the county of *Lincoln*, under a grant or letters patent, dated the 7th May, 1631 (6 Car. 1,) which was under the seal of the Duchy of *Lancaster*, and by which *Charles the 1st*, in consideration of 2,350*l.*, granted to *Charles Harbord*, *Christian Favell*, and *Thomas Young*, and their heirs, under whom the plaintiff claimed, (among several other manors, lordships, castles, hundreds, tenements, and hereditaments, &c.) the manor of *Greetham*, in the county of *Lincoln*, with all its rights, members, and appurtenances, the reeveship of *Greetham*, and the bailiwick of *Greetham*, and all lands, tenements, rents, and hereditaments whatsoever in *Greetham*, and various other places (omitting the parish of *Sutton*), or in any or either of them, or elsewhere in the said county of *Lincoln*, called or known by the name of the lordship or manor of *Greetham* aforesaid, to the said lordship or manor, reeveship or bailiwick of *Greetham*, in any wise belonging or appertaining, or as member, part, or parcel of them, or any of them, being heretofore had, known, accepted, occupied, used, or reputed, with all and every of their appurtenances, (which said lordship or manor of *Greetham*, and other the premises before granted, were, by a particular thereof, mentioned to be altogether parcel

Parol evidence cannot be resorted to, in order to support a prescriptive right to wreck, if it appear that the property in respect of which wreck is claimed, was in the crown in the time of *Charles the 1st*, as a Jury could not infer that it was in those under whom the party claims, from time of legal memory.

If the king make a grant which cannot take effect according to its terms, it must be concluded that he has been deceived in his grant, and it is void. Where, therefore, wreck was conveyed by lease for a term of years, which had not expired; if such lease be not recited in a grant conveying an immediate estate in fee to the grantees, such grant is void, because the king having already leased the right of possession, he

cannot convey the same right to another, and all leases from the king must be enrolled.

Although the king holds lands as duke of *Lancaster*, he holds them as king also; and the prerogative and privileges of the king belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his Crown: therefore, a grant under the Duchy seal is subject to all the incidents of a grant from the Crown.

It seems that wreck will not pass under general words in a grant.

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of the antient lands and possessions of the Duchy of *Lancaster* in the county of *Lincoln*), and all and singular the granges, farms, &c., and all rents, revenues, and services, rents-charge, rents-seck, &c., yearly rents, increased rents, fee-farm rents, courts-leet, &c., and all that to courts-leet did in any wise belong or appertain, immunities, acquittances, and hereditaments whatsoever, with all and singular their rights, members, and appurtenances, of what kind or nature soever they be, or by what name soever they are known, deemed, called, or acknowledged, situate, lying, and being, issuing, growing, renewing, happening, or arising, in or within the lordships, manors, hundreds, towns, places, fields, parishes, or hamlets aforesaid, or in or within any or either of them, or elsewhere, or wheresoever, to the aforesaid castles, lordships, manors, hundreds, messuages, lands, tenements, and hereditaments, and other the premises by those presents before granted, or mentioned so to be, to any or either of them, or to any part or parcel thereof, in any wise belonging, appertaining, incident, appendant, or incumbent, or as member, part or parcel of the same, being at any time theretofore had, known, accepted, occupied, and demised, leased, or reputed; and the reversion, or reversions &c., dependent or expectant of, in, or upon, any gift or gifts in fee-tail, or any demise or grant for the term or terms of life, or lives, or years, and also all rents reserved upon any demise or grant, demises or grants:—And, by the same letters patent, the said king *Charles* the 1st, did also grant unto the said *Charles Harbord*, *Christian Favell*, and *Thomas Young*, their heirs and assigns, that they, their heirs and assigns, should, *from henceforth, for ever*, have, hold, and enjoy, within the aforesaid castles, lordships, manors, hundreds, lands, tenements, and hereditaments, and all and singular other the premises thereby granted, *as many, as great, such, the same*, and the like courts-leet, views of frank pledge, hundred courts, law-days, assize

and assay of bread, wine, and beer, goods and chattels waived, estrays, deodands, escheats, reliefs, heriots, free-warrens, hawkings, huntings, *and all other rights, jurisdictions, and franchises, liberties, privileges, customs, immunities, acquittances, profits, commodities, advantages, emoluments, and hereditaments whatsoever, as and which, and as fully, freely, and wholly, and in as ample manner and form as any abbot or prior of any late monastery, abbey, or priory, or any Duke of Lancaster, or any other person or persons at any time having, possessing, or being seised of the aforesaid castles, lordships, manors, messuages, lands, tenements, and hereditaments, and other premises thereinbefore granted, or mentioned so to be, or any parcel thereof, ever had, held, used, or enjoyed, or ought to have had, held, used, or enjoyed in the premises thereinbefore granted, by reason or pretext of any act or acts of Parliament, or of any charter of gift, grant, or confirmation, or by reason of any letters patent by the said king, or any of his progenitors or ancestors, then late kings or queens of England, theretofore had, made, granted or confirmed, or by reason or pretext of any lawful prescription, use, or custom theretofore had or used, or by any other lawful means, right, or title whatsoever; and as fully, freely, and wholly, and in as ample manner and form, as the said king, or any of his progenitors or ancestors, then late kings or queens of England, had had or enjoyed, or ought to have had or enjoyed, in the premises thereinbefore granted, or mentioned so to be, or in part or parcel thereof, or by reason or pretext of the premises, or of any parcel thereof: except always nevertheless, and out of that grant altogether reserved, all knight's fees, wards, &c., and all services for or in respect thereof, and all advowsons, donations, free dispositions, and right of patronage of all and singular rectories, churches, vicarages, chapels, and all other ecclesiastical benefices whatsoever, to the premises, or any or either of them, in any wise belonging, appertaining, in-*

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cident, appendant, or incumbent; *and also except all royal mines of gold and silver being or to be found within or upon the premises, and all prerogatives to the same mines belonging.*

The plaintiff then produced an extract from Domesday-book, to shew that the parish of *Sutton* was part of the manor of *Grendham* or *Greetham*; and in order to shew that the reversion of the right to wreck was vested in *Charles* the 1st, at the date of the above grant, the plaintiff put in an indenture of lease of the 5th *January*, 12th *James* 1st, and made between that king of the first part, and one *John Livingstone* of the other part, whereby the king granted, and to farm let, to *Livingstone* (among other things) all and singular the profits and commodities happening *within the honour of Bolingbroke*, parcel of the Duchy of *Lancaster*, in the county of *Lincoln*, of the goods and chattels, and debts and credits whatsoever, of felons, felons of themselves, and fugitives, clerks convicted, persons outlawed, deodands, waifs, estrays, and *wrecks of the sea*, as well in the accounts of the bailiffs and ministers of the said honour of *Bolingbroke* aforesaid, accountable as otherwise, within the said honour, to the said lord the king, answered or to be answered:—To hold the same unto the said *John Livingstone*, from *Michaelmas* then last, for the term of thirty-one years, at the yearly rent of 6*l.*, and a moiety of all profits amounting in themselves to 50*l.* and upwards.

It was then proved by other documentary evidence, that the honour of *Bolingbroke* comprised the manor of *Greetham*. The plaintiff then gave in evidence certain proceedings in a suit, by way of information, instituted in the Duchy Court of *Lancaster*, commencing in the 8th and ending in the 13th year of *Charles* the 1st, relating to the right of wreck within the manor of *Sutton*, among various other places, which was alleged to be within the honour of *Bolingbroke*; and which suit was in the nature of a prayer for pro-

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cess by the Attorney-General of the Duchy Court, on the relation of one *Charles Harbord*, the Surveyor-General of the Duchy, (one of the grantees named in the grant of *Charles* the 1st), against one *Rogers*; and in the information, the lease of *James* the 1st to *Livingstone* was recited, and, both in the information and decree, *Sutton* was mentioned as being within the manor of *Grendham*, alias *Greetham*, and *Greetham* as being within the honour of *Bolingbroke*; but the defendant *Rogers*, in his answer, did not justify or lay claim to any property or right of wreck within *Sutton*. The plaintiff then gave in evidence deeds of 1703 and 1707, by which it appeared, that the right of the grantees in the grant of *Charles* the 1st had been regularly conveyed down to the plaintiff's predecessors, and from them to him. Several witnesses were then called, to shew, that the immediate persons under whom the plaintiff claimed, had exercised an unlimited and undisputed right to take wreck in the parish of *Sutton*, until the year 1760.

The defendant, in support of his title, put in a bill and answer in *Chancery*, in 1763, and proved, by several witnesses, that, from that time, he, and those from whom he took the estate under a decree in that cause, had not only *claimed* wreck in the parish of *Sutton*, but had frequently exercised their right in taking it. It was then objected for the defendant, that as wreck was a royal prerogative, it did not pass by the general words contained in the grant or letters patent of *Charles* the 1st; and that, even if it could pass by the terms of that grant, as *Sutton* was not mentioned therein, the plaintiff had no right to claim wreck in that parish, particularly, as it had not been satisfactorily proved that the parish of *Sutton* was within the manor of *Greetham*. The Jury, however, found a verdict for the plaintiff; the Lord Chief Justice reserving to the defendant leave to move to set it aside, if the Court should be of opinion that wreck was not conveyed under the words contained in the grant of *Charles* the 1st; and also, if it were not, or that

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that deed were void, then, whether the plaintiff had adduced sufficient proof of the exercise of a right to support a claim by prescription to take such wreck.

Mr. Serjeant *Adams*, in the last Term, accordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted; and submitted that the plaintiff could only recover on the strength of his own title; and that, as he had not proved *Sutton* to be within the manor of *Greetham*, he could not be entitled to claim wreck within that parish. Besides, the defendant had not only proved a usage within the recollection of all living witnesses, but the exercise of a right to take wreck in *Sutton*, from 1768 to the present day. It is evident that the grant of the 6th of *Charles* the 1st, conveyed no right of wreck to the plaintiff under the general words therein contained; neither did the proceedings in the Duchy Court of *Lancaster* tend to support that right, as the defendant *Rogers* did not attempt to justify a claim to take wreck in *Sutton*. The grant of *Charles* the 1st merely gave to the grantees, therein named, all the rights, jurisdictions, and franchises, &c. &c., in as ample manner and form as any abbot or prior of any late monastery, abbey, or priory, or any Duke of *Lancaster*, had held or enjoyed the premises by that deed granted; and, it was impossible for a Court or Jury to know what would pass under those words, or what property or interest an abbot or former Duke of *Lancaster* might have had in the premises conveyed. In *Comyns's Digest* (a), it is said, that "general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative; for that such ought to be expressly mentioned. Again, it is said (b), that, if liberties, franchises, &c., which were appendant to a manor, as *wrecks*, *waifs*, *estrays*, &c., come

(a) Tit. "Grant," G. 7.

(b) Id. Tit. "Franchises," G. 1.

with the manor to the king, the appendancy is extinct, and the king is seised of them, as before, *in jure coronæ*. The only evidence adduced by the plaintiff, to shew that *Sutton* was within the manor of *Greetham*, was an extract from *Domesday-book*, which was improperly indorsed and intitled, as the book itself only relates to certain lands which Earl *Hugh* had in divers sokes and parishes in the county of *Lincoln*.

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Mr. Serjeant *Wilde*, on a former day in this Term, shewed cause.—Although the grant of 1631, on which the plaintiff relies, is a grant by *Charles* the 1st, yet it is not a grant from the Crown. The only question is, as to the nature of the grant, and the rules of construction by which its meaning is to be ascertained. It is not necessary to dispute that wreck is not a prerogative right of the Crown, as the grant in question appears to have been made and executed under the seal of the Duchy Court of *Lancaster*. Although the Duchy of *Lancaster* came to the Crown when *Henry* the 4th ascended the throne, yet he was too prudent to suffer it to be united to the Crown, which he had wrested from *Richard* the 2nd, lest, if he lost the one, he should be deprived of the other also; and, therefore, he procured an act of Parliament in the first year of his reign, ordaining that the Duchy of *Lancaster* should remain to him and his heirs for ever, and descend in like manner as if he never had attained the regal dignity, and thus it descended to his son, and grandson, *Henry* the 5th, and *Henry* the 6th. But the latter king being attainted in the first year of the reign of *Edward* the 4th, the Duchy was declared to have become forfeited to the Crown, and the statute 1 *Edward* 4, c. 1, was passed, by which the whole of the Duchy of *Lancaster* was vested in that king and his heirs, kings of *England*, for ever, but under a *separate guiding and governance* from the

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exercised a right to take wreck, and the plaintiff gave evidence of a user by them from the date of that deed to the year 1760, such right ought not to be disturbed; and consequently the parol evidence adduced at the trial, in order to establish a right by prescription, need not be resorted to.

Mr. Serjeant *Adams*, in support of his rule.—The honour of *Bolingbroke* is altogether distinct from the manor of *Greetham*, and the latter is not co-extensive with the former, which is composed of many manors. The statute of prerogatives (17 *Edw. 2*, c. 11) is decisive to shew that the prerogative in wreck of the sea is in the king; and what is a royal prerogative when in the Crown, becomes a franchise in the hands of a subject; and, as wreck was not mentioned in the grant of *Charles* the 1st, no right to it was conveyed to the three grantees named in that deed. It cannot be disputed but that wrecks of the sea within the honour of *Bolingbroke* were conveyed to *Livingstone*, for the term of thirty-one years, by the lease of *James* the 1st; but that lease had not expired at the time of the grant of *Charles* the 1st; and, in *Comyns's Digest*, it is said (a), that general words in the king's grant never extend to a grant of things which belong to the king by virtue of his prerogative, for that such ought to be expressly mentioned; and that, if *bona felonum*, &c., which lie in grant, and not in prescription, are reunited to the Crown, and afterwards the king grants the manor, *cum totis talibus libertatibus, privilegiis, &c. qualia A., nuper abbas, habuit*, who claimed the same privileges by charter, the grantee shall not have *bona felonum* by such general words; and *Rolle's Abridgment* (b), and Sir *William Jones* (c), are referred to as authorities in support of this position.

(a) Tit. "Grant," G. 7.

(b) Vol. 2, 193, l. 40.

(c) 349.

Again, it is said (a), "that, if franchises and liberties are granted by the king, which were before *in esse*, as flowers of his Crown, and afterwards, by escheat, surrender, or otherwise, come back to the Crown, they are re-united to the Crown, and the king has them *in jure coronæ*, as before." A right to take wreck may be assimilated to a right to take toll, which is usually annexed to a fair or market; but toll is not of right incident thereto, and can only be claimed by special grant from the Crown, or by prescription; and, in *Heddy v. Wheelhouse* (b), it was held, that, if liberties, franchises, &c., which were appendant to a manor, as *wrecks*, waifs, estrays, &c., come with the manor to the king, the appendancy is extinct, and the king is seised of them in right of his Crown, and they cannot afterwards be granted but by a new creation; and it is equally clear that the king cannot be deprived of a prerogative right by general words. That case was considered an authority, and its principle fully recognized in that of the Abbot of *Strata Mercella* (c), where it is said, that, when the king *grants* any privileges, liberties, or franchises, which were in his own hands, as (among others) *wreccum maris*, &c., if they come again to the king, they are merged in the Crown; and, if the wreck, &c. were appendant before to possessions, the appendancy is extinct, and the king is seised of them *in jure coronæ*. By the statute 27 Hen. 8, c. 28, dissolved monasteries were given to the Crown, to be held in the same manner as they were held by the abbots; and the statute 32 Hen. 8, c. 20, which was passed to explain the former act, enacts, that the king shall hold such monasteries in the same way as the abbots held them, and that the liberties and privileges, and royal prerogatives, shall not be extinct; and the case of the Abbot of *Strata Mercella* was founded principally on the construction of these two statutes, and how far they altered

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(a) Tit. "Franchises," G. 1. (b) Cro. Eliz. 591. (c) 9 Rep. 25 b.

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the course of the common law, *vis.* that a franchise reunited to the Crown becomes again a royal prerogative, and must be re-granted by the Crown. A County Palatine is a royal prerogative, and although it may pass by prescription; yet it cannot be contended that it can pass under the *general words* of a grant, and, as wreck is equally a royal prerogative, if the one cannot pass by general words, neither can the other. At all events, it does not appear that there was any intention that wreck should pass under the grant, neither is it a grant of the reversion of the property previously leased to *Livingstone*, as that was confined to profits, waifs, estrays, and wrecks arising within the honour of *Bolingbroke*, not one of which is mentioned in the grant to *Harbord* and his co-grantees. Admitting that the Duchy of *Lancaster* is held separately from the Crown, yet, in *Comyns's Digest* (a), it is said, that the King shall have the same prerogative where he is seised in right of the Duchy of *Lancaster*, as where he is seised in right of the Crown. And the case of *The Queen v. The Archbishop of York* (b), is referred to in support of that position. That case is more fully reported in *Plowden*, where it is called "The case of the Duchy of *Lancaster*;" and it is there said (c), that, by the statute 1 *Edw.* 4, all possessions which king *Henry* 6th had invested in and annexed to the Crown, by that act are created to be the Duchy of *Lancaster*, and that the king shall have a seal and officers for the Duchy, and that they shall be managed separately from the other possessions of the king. It therefore follows that a grant of property within the Duchy must be subject to the same incidents as a grant from the Crown. And in the *Fourth Institute* (d), it is expressly said, that if a lease either in possession or reversion be made under the Duchy seal, such lease is good, although in truth the Chancellor

(a) Tit. "Franchises," D. 3.

(b) Cro. Eliz. 240.

(c) Plow. 219.

(d) 209.

made it, and put the seal of the Duchy, for that such leases under the Duchy seal of lands within the Duchy are of as great force as lands of the Crown under the great seal. Again, it is quite clear, that the king's grant cannot enure to a double intent, and in *Comyns's Digest* (a), it is said, that if the king be deceived in his grant, it will be void, though made *ex certa scientiâ* &c.; and (b), that, if the king's grant can enure to two intents, it shall be taken to the intent that makes most for the king's benefit, and therefore that it shall be construed strictly.

At all events, the grant of *Charles* the 1st, is void, as it in terms grants an immediate estate in fee, in possession, to the three grantees therein named, *vis. from thenceforth for ever*, whereas, at that time, the reversion only was vested in the king, as the lease to *Livingstone* had not expired; and in *Alton Wood's* case, it is said (c): "If the king makes a lease for years, or for life, and afterwards grants the land to another, in fee, or in tail, without reciting the lease, the last grant is void; first, because the king grants an estate in possession, where he hath but a reversion, and so is deceived in his grant; and the subject had a way to come to the knowledge of the said lease; for, every patent ought to be enrolled in the *Chancery*, to which all subjects may have access." So, in *Rolle's Abridgment* (d), it is said, if the king leases land to another, and afterwards makes a new lease to the same party, this is void, without recital of the first lease. And in the *Earl of Rutland's* case (e), it was decided, that if the king grant an office for life, and afterwards grant the same office, *post mortem*, to another, he ought to recite the first grant, although it is not properly a reversion; and that, without a special recital of the first estate for life, the second grant is void. And

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(a) Tit. "Grant," G. 11.

(b) Id. G. 12.

(c) 1 Rep. 45.

(d) Tit. "Prerogative Le Roy."

Q. pl. 4, Vol. 2, p. 190.

(e) 8 Rep. 57.

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here, as the lease to *Livingstone* for thirty-one years, which was produced to shew that the reversion of the right to wreck was vested in *Charles the 1st*, was not recited in the grant, it was altogether void. . . Whether, therefore, *Sutton* were or were not within that grant, and although wreck might pass under the general words therein contained, yet, as it was a grant to the grantees therein named, in fee, with immediate possession, and it did not recite the lease to *Livingstone*, which had not then expired, the grant was altogether void, although wrecks of the sea might have passed to *Livingstone* under that lease.

Cir. adv. coll.

Lord Chief Justice BUR now delivered the judgment of the Court as follows:—This was an action of trover, brought by the plaintiff, who claimed a right to take wreck cast on shore within the parish of *Sutton in the Marsh*, in the county of *Lincoln*. . . At the trial before me, at the last Assizes for that county, a great number of deeds were put in, which I had no opportunity of seeing until the cause was called on. . . If I had, it might have saved the parties the expense of this application to the Court; and I trust that, ere long, some practice will be adopted, by which Judges will be enabled to see the material parts of deeds on which parties may rely, previously to the trial. . . In this case, a great deal of parol evidence was resorted to by the plaintiff, in order to establish a right to take wreck by prescription. . . At the close of the argument, on the motion to set aside the verdict found for the plaintiff, I only doubted whether there should be a new trial, or that a nonsuit should be entered on the points reserved; but we are now unanimously of opinion, that a nonsuit must be entered. With respect to a new trial, it was taken for granted, at the trial, that the lands on which the wreck was claimed were in the parish of *Sutton*; and an extract

from Domesday-book was given in evidence, in order to shew that *Sutton* was within the manor of *Greetham*; and as it was indorsed and intitled in large letters at the head, ("Return of the manor of *Greetham*,") I took it for granted, that it was a description of that manor, and that manor only, and that impression was confirmed by the mode in which the extract began and was continued throughout, viz. 'the manor of *Greetham*.' But having since had an opportunity of looking at Domesday-book, it appears to me to be perfectly clear that *Sutton* is not within that manor; because, instead of the title being—a return of the manor of *Greetham*, it is—a return of the lands of Earl *Hugh*, in the manor of *Greetham* and elsewhere; and it then describes that manor; and in that part which treats of it, *Sutton* is not included, but is inserted lower down in a description of other lands, which Earl *Hugh* had in a certain soke; and in the next paragraph certain other lands of the Earl are described; and it is then stated, that 'all this land or soke pertains to *Greetham*;' therefore, *Sutton* having been described as being within the former soke, and not being specified in the latter, it seems to me to be perfectly clear that it is not in *Greetham*, but in some other manor belonging to the Duchy of *Lancaster*. Although, in the decree in the Duchy Court, *Sutton* is spoken of as being within the manor of *Greetham*, yet, that was merely evidence of a fact of which the parties might have been mistaken; and although the Attorney-General in his information, recited the lease to *Livingstone*, he did not mention the grant of *Charles* the 1st; nor did the defendant *Rogers* attempt or pretend in his plea to claim wreck in *Sutton*, but only in certain places in the plea specifically mentioned; and although, in the decree, *Sutton* is mentioned as being part of *Greetham*, yet no part of the wreck taken was to be accounted for in *Sutton*, but only in those places mentioned in the plea. If, therefore, this case were sent down to a new trial, it appears to me that a Jury could come

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to no other conclusion but that *Sutton* is not a part of the manor of *Greetham*.

With respect to the nonsuit, I reserved two points at the trial, *viz.* *First*, whether, supposing *Sutton* to be within the manor of *Greetham*, wreck was conveyed under the deed of *Charles* the 1st, to the grantees named in that deed, and, through those persons, to the plaintiff; and, *Secondly*, supposing wreck not to be conveyed, whether the parol evidence adduced by the plaintiff was sufficient to support a prescriptive right to wreck. I will, in the first instance, shortly dispose of the *second* question. The plaintiff's parol evidence cannot support a prescriptive right to wreck, because it clearly appears, from the information and proceedings in the Duchy Court of *Lancaster*, that all this property was in the Crown so late as in the reign of *Charles* the 1st; and, if so, the plaintiff could not make out a good title to wreck by prescription, inasmuch as he had not adduced evidence from which the Jury might infer that it was in those whose estate he holds, from time of legal memory. It seems to me, therefore, to be impossible (strong as the evidence may be) that the plaintiff can make out, in this case, a title to wreck by prescription. That brings me to the other point, and, indeed, the main question in the cause, *viz.* whether or not the deed of the 6th of *Charles* the 1st conveyed wreck to the grantees therein named. Two points have been raised on that deed: *first*, that wreck will not pass under general words; and *secondly*, that the grant is void, as granting in possession that of which the Crown had only the reversion. Now, as to whether wreck will or will not pass under general words, there is a great deal of confusion in the cases, which it is not necessary for us to attempt to reconcile, as we shall decide this case on another point. It was taken for granted at the trial, and there now can be no doubt, but that *Sutton* was a place or parish, the property of wreck in which was leased by indenture in the 13th *James* the 1st to *Livingstone*. That indenture is a lease

from the king; and it is most material to observe that every lease from the king must be enrolled. This has on its title "*from the 9th to 13th James 1, folio 140.*" It is made between the most excellent prince and lord king *James*, by the grace of God, &c., of the one part; and *John Livingstone*, Esq., one of the grooms of the chamber of the said lord the king, of the other part. It then grants wreck in a number of different places, and also all and singular the profits and commodities happening and arising within the whole honour of *Bolingbroke*, (and it is taken for granted, that *Greetham* is a part of the honour of *Bolingbroke*), parcel of the Duchy of *Lancaster*, in the county of *Lincoln*, of the goods and chattels, and debts and credits whatsoever, of felons, &c., deodands, waifs, estrays, and wrecks of the sea, as well in the accounts of the bailiffs of the said honour of *Bolingbroke*, as otherwise, to *Livingstone*, for the term of thirty-one years; so that wreck of the sea is leased to him in express terms. In the decree in the Duchy Court of *Lancaster*, this lease to *Livingstone* is recited as an existing lease. Now, at the time that decree was pronounced, the grant of the 6 Car. 1, had been executed: the lease, therefore, was an existing lease, at the time of such grant.

This brings me to the question, whether, as the king had granted a lease of this property, and had not recited that lease in the grant of the fee-farm, in perpetuity, the latter grant was not, by the common law of *England*, altogether void? We are of opinion, that it was altogether void. We take it to be a principle of the common law of this country, that, if the king makes a grant which cannot take effect in the manner in which it ought to take effect, according to its terms, we must conclude that the king has been deceived in that grant, and, therefore, that the grant is void. I have said already, that the grant does not contain the word *Sutton*; but I am now assuming that *Sutton* is a part of *Greetham*, and that the conveyance applies to *Greetham* in all its parts.

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If *Sutton* be not a part of *Greetham*, the plaintiff is a perfect stranger, and cannot have the least pretence to maintain this action. Assuming, however, that *Sutton* is within *Greetham*, and wreck could be well conveyed, yet, in our opinion, it is not well conveyed; because, having been before granted by lease, and that lease not being recited, the king has proposed or made a grant which he could not carry into effect; for, having already leased the right of possession, he proposed, by the grant, to convey the same right of possession to another person. Now, it would be inconsistent with the king's honour (and it is stated in a case to which I shall presently refer, that the common law has no object that is dearer to it than to preserve that honour), it would, I repeat, be inconsistent with the king's honour, that he should grant the right of possession in the same thing to two different persons: and, therefore, the latter grant is altogether void. It is unnecessary to refer to cases; for, it is an established principle, that, if the king is deceived in his grant, such grant is altogether void. It cannot be supposed, unless he is deceived in his grant, that he would grant to *A.* that which he has already granted to *B.*; that would be giving rise to a series of litigations, which it is always the object of the king to prevent. I must, however, guard the observation I am now making, and to which I have already called the attention of the Court, *viz.* the circumstance of this being a lease from the king, which must be enrolled; because the doctrine which I am now laying down, is applicable only to grants so enrolled; for, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king re-grants that, as the subject could not know with certainty that there was a previously existing lease, the doctrine I have been laying down would not apply, because the prerogative of the Crown would press hardly upon the subject: but the doctrine that I am now delivering is applicable to a case

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where the subject cannot be deceived, and he must be deceiving the king; for, if the king's prior lease be enrolled, as it is stated in all the cases it must be, the subject has the means of knowing the existence of that lease, and it is his duty to inform the king of its existence. The lease in question, granted by *James* the 1st to *Livingstone*, was a lease enrolled, and the grantees, under whom the plaintiff claimed, when they accepted the grant of 6 *Car.* 1, had the means of knowing of the existence of that lease. In the case of the Earl of *Rutland* (a), it was decided, that when one is officer for life, if the king, without reciting it, grants the office to another for life, the second grant is void, for want of a recital; but no book says, that, *if the king recites* the first grant of the office, &c., and also recites that the officer is living, and grants the office to another for life, that this last grant shall be void for want of certainty. It will be seen that this case turns on precisely the same principle. If the king grants an office for life, and grants the same office to another, it might be argued that the two estates might co-exist, because the second grant might give an interest after the first life is determined. But still it is void altogether, because it professes to give an immediate interest, and that immediate interest the king cannot give, because the office is full, and there is a possibility that he has been deceived. But, if there had been a recital of the former grant, and also a statement of the fact that the former grantee was still alive, it is then perfectly clear that the king could not have been deceived, and the grant will have the effect of giving to the person in whose favour it is made, the estate, or office, after the life of the first grantee. If, therefore, these two facts are not recited, it must be taken for granted, when the king makes a grant inconsistent with the former grant, that he is deceived; and therefore it will not give the intended interest in the

(a) 8 Rep. 57 a.

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office after the life of the former grantee, but will be altogether void. Apply that principle to the present case: if the king had recited the lease to *Livingstone*, although he had granted the fee simple during the existence of that lease, it would have been clear from the recital that he knew of the lease; but he does not recite the lease, and, therefore, it must be taken for granted, when he makes another grant which could not be immediately carried into effect, although, according to its terms, it is immediately to be carried into effect, that the king is deceived, and that, therefore, the second grant is void. The next case, that of *Alton Woods*, is entitled to the greatest consideration, because it came on, upon a writ of error, before eight Judges, that is, all the Judges of *England*, except the Barons of the *Exchequer*. The opinion of the Judges had also the confirmation of Sir *Thomas Egerton*, the Lord Keeper, a most eminent lawyer, and afterwards my Lord *Ellesmere*. The Judges in that case say (and this is the very point now under consideration), (a) when the king makes a lease for life or years, and afterwards, without reciting them, grants the land in fee or in tail, although the king is stated to make this grant *ex certa scientia et mero motu*, the said grant, without recital, is void, by reason of the common law, because the king is deceived in his grant when he intends to grant that in possession which cannot take effect, which the king doth purpose and intend. Afterwards, Lord Keeper *Egerton* says, that it was sufficient for him to rely upon the opinion of the Judges. My Lord Treasurer expressed the same opinion; and the Lord Keeper says (b), "The king ought to be informed of his own estate, whether it be in possession or reversion." So that my Lord Keeper distinctly states the principle on which we are now putting this case: "You, the subject, who knew of the lease, ought to inform the king of the lease, and

(a) 1 Rep. 50 a.

(b) Ib. 51 b.

then you will see whether he will make a grant which he cannot completely carry into effect during the existence of that lease." In *Comyns's Digest* (a), and *Rolle's Abridgment*, tit. "*Prerogative le Roy*" (b), a great number of cases, which it would be an idle waste of time to state to the Court, are collected, in which the distinction is taken, which I have before mentioned, *viz.* that, if a lease from the king be enrolled, a subsequent grant of the same estate, not reciting the lease, is void. So that the doctrine of these two cases, which has been confirmed by several others, has become the settled law of the land, and has been adopted by the most eminent text writers. The names of Lord *Rolle*, and Lord Chief Baron *Comyns*, are of themselves sufficient to shew that they have been considered of the highest authority.

But it has been said, that these lands belonged to the Duke of *Lancaster*, and that the statute of *Henry* the 4th separates the lands of the duke from the lands of the king: that is perfectly true, as that king imagined that, although some of his descendants might not keep the Crown on their own heads, still, that there might be one of them who might wear the ducal coronet of *Lancaster*. But, although, by that statute, the lands of the Duchy of *Lancaster* are kept separate from those which are called the Crown lands, by whom are they held? Are they held by a mere Duke of *Lancaster*? Or, when the king, as Duke of *Lancaster*, is the identical person, are they held by the king? Does the king descend from his high estate, to hold lands in any part of the kingdom, upon different terms from those on which he holds all his other estates? It would be inconsistent with the dignity of the king that he should do so; and, therefore, it has been decided, that, although he holds lands as Duke of *Lancaster*, he holds them as king also; and that the prerogative and all the privileges of the king belong to him with

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(a) Tit. "*Grant*," (G. 10).

(b) Vol. 2, 190.

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reference to those lands, the same as they do with reference to lands which belong to him immediately in right of his Crown. In the case of *The Queen v. The Archbishop of York* (a), the question on the record was, whether a double and treble usurpation put Queen *Elizabeth* out of possession of an advowson which she had in the right of the Duchy of *Lancaster*? and it was adjudged that it did not: as she had her privilege in this as if it had been in her in right of the Crown. Here is an express opinion of the whole Court, that the king or queen has the same privilege with respect to the Duchy lands, that they have with respect to lands which belong to the Crown. In *Plowden's Commentaries*, that case is called "The case of the Duchy of *Lancaster*," in which a question was referred to all the Judges for their opinion, with respect to certain leases that had been granted by king *Edward* 6th, during his minority, the Judges used these words (b): "It seemed to them, that the whole intent of king *Henry* the 4th, and of the charter and act, was only to sever the lands, &c., of the Duchy from the hereditaments of the Crown, but not from the person of the king, so long as God granted that the Crown and the Duchy should continue together in the blood of the Duke of *Lancaster*, and of the mother of *Henry* the 4th; and that, if the Crown should be afterwards taken out of the blood of the Duke, yet, that the Duchy should remain his; so that the intent of the charter might be satisfied without derogating from the person of the king, or destroying the dignity or pre-eminence which the law attributes to him." Nothing can be more express than this, viz. that the king has separate estates; estate A., belonging to his Crown estate, and B., belonging to his Duchy of *Lancaster*. Although he holds B. as belonging to his Duchy, he holds it also as king, and he has the same privi-

(a) Cro. Eliz. 241.

(b) Page 217 a.

leges and immunities as he has with respect to his other property; and so the Judges determined in that case. Although *Edward* 6th had granted a lease of the estate before he was twenty-one, that lease, which would have been bad in case he had been mere Duke of *Lancaster*, yet, as he was also king of *England* at the same time that he was Duke of *Lancaster*, was good. Lord *Coke* puts this very strongly in his account of the Duchy Court of *Lancaster* (a), *sic*. "All this appeareth by that great and grave resolution of the case of the Duchy of *Lancaster*, reported by Mr. *Plowden*, that no statute now in force doth separate the Duchy from the person of the king, nor to have the person of the king separate from the Duchy, nor to make the king Duke of *Lancaster*, having regard to the possessions of the Duchy, nor to alter the quality of the person of king *Henry* the 7th; but only that the King should have, to him and to his heirs, the said Duchy separate from other possessions. In which case, the Duchy at the least is joined to the person of *Henry* the 7th, and to his heirs, and the person of the king remains as it did before; for nothing is said to the quality of the person of the king, nor to the alteration of his name; and the person of the king shall not be enfeebled, because the Duchy is given to the king and his heirs, but remains always of full age as well to gifts and grants by him made, as to administration of justice; whereupon it was resolved, that leases made by *Edward* the 6th, being within age, of lands, either within the county of *Lancaster*, or without, parcel of the Duchy (the royal and politic capacity of the king being not altered), were not voidable by his non-age. A just resolution, and tending to the safety and quiet of purchasers and farmors, and proveth directly, that the royal and politic capacity of the king being not altered (as to these possessions), the letters patent of the king, of these possessions, under the

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(a) 4th Inst. 209.

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Duchy seal, are of record. And we find no opinion in our books, or any thing in any record, that we remember, against this." I think this is abundantly satisfactory, and sufficient to shew that there is no distinction between the privilege of the king as Duke of *Lancaster*, and the prerogative of the king as king of *England*. If that be so, then, reverting to what I have already stated, that, by the prerogative of the king, if the king is deceived in his grant, the grant is altogether void; and it appearing by decided cases, that it must be taken that the king is deceived in his grant; when he grants that which he cannot give according to the terms of his grant; it appearing also, that, at the time the grant of 6 Car. 1 was executed, the property granted was already in the possession of *Livingstone*, under a lease to him for years, and that that lease had several years to run, the grant of 6 Car. 1 is altogether void; and, for these reasons, we are of opinion that the rule for entering a nonsuit must be made—

Absolute.

Saturday,
Feb. 7th.

DOR d. CHEESE and DAVIES v. CREED.

DOE d. DAVIES, CHEESE, and Another v. CREED.

Two writs of *elegit*, tested and issued on the same day, upon judgments signed in the same Term, were delivered to the Sheriff together:—*Held*, that an entire

THESE were actions of ejectment brought by the lessors of the plaintiffs, as the judgment-creditors of one *Edward Chinn*.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Hereford*, it appeared, that, in *Easter Term*, 6 Geo, 4, viz. on the 14th May, 1825, the lessors of the moiety of the defendant's lands might be extended on each writ, although the judgments were obtained and writs sued out by different plaintiffs, and the inquisition on the second writ recited that a moiety of the lands had been extended on the first.

In the case of an adverse possession in ejectment, it is not necessary to give a notice to quit to the tenants in possession; where, therefore, a party defended as landlord, and the occupiers suffered judgment by default:—*Held*, that the defendant could not object that the occupiers had not received notice to quit from the lessors of the plaintiff (judgment creditors), who claimed adversely to the party under whom the tenants occupied.

plaintiffs obtained two several judgments against *Chinn* in actions of debt on bond; that two writs of *elegit* were sued out upon such judgments, tested and dated on the said 14th *May*, and on that day delivered to the Sheriff of *Herefordshire*, to be executed; and that inquisitions were held on both *elegits*, on the 31st of *May* following. The *first* inquisition found, that *Chinn* was, on the day of taking the inquisition, seised for life of a certain messuage or tenement, called the *Great House*, with two pieces of meadow ground adjoining thereto, and then in the occupation of *John* and *Samuel Owens*, at the clear yearly rent of 104*l.*; and also of three meadows in the occupation of *James Evans*, at the yearly rent of 30*l.*; and also of two other pieces of meadow, in the occupation of *Susannah Cooper*, at the yearly rent of 18*l.* The Jurors then found, that the said messuage, &c., called the *Great House*, with a meadow in the occupation of *J.* and *S. Owens*, of the yearly value of 76*l.* (a), were a true and equal moiety of all and singular the lands, tenements, and hereditaments of *Chinn*, in the writ named, and which moiety, the Sheriff, on the day of taking the inquisition, had caused to be delivered to *John Cheese*, and *James Davies*, in the writ named, at the reasonable price and extent aforesaid; to hold the same, to them and their assigns, until the debt and damages in the writ mentioned should be thereout fully levied. The *second* inquisition, after finding that *Chinn* was, on the day of taking thereof, seised for life, of the same lands, in the occupation of the same persons, and of the same annual rent or value as in the first, proceeded as follows:—"a moiety of all which said hereditaments and premises hath been *this day* extended by me, the said Sheriff, in a certain *other action* against the said *Edward Chinn*, at the suit of *John Cheese* and *James Davies*." And the Jurors further found, that one of the meadows, as being in the occupation of *J.* and *S. Owens*, with

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(a) The whole amounting to 152*l.*

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the messuage called the *Great House*, and containing four acres, of the yearly value of 20*l.*; and the three meadows in the occupation of *J. Evans*, of the yearly value of 30*l.*; and the said two pieces of meadow, in the occupation of *S. Cooper*, of the yearly value of 18*l.* (a), were a true and equal moiety of all and singular the lands, &c., of *Chinn*, in the said (second) writ named; and which said moiety the Sheriff had caused to be delivered to *James Davies*, *E. W. Cheese*, and *J. Cheese*, in the said writ named, at the reasonable price and extent aforesaid: to hold the same, &c., (as in the first inquisition).

On these writs of inquisition, the present actions were commenced, in order to recover the possession of the premises; and, as the defendant *Creed* had not occupied any part of them, but claimed to be entitled under a conveyance from *Chinn*, he was admitted to defend as landlord, under the following rule: *viz.* "that *William Creed*, landlord of the premises, be joined and made defendant with the tenants in possession, in the stead of the casual ejector, in case the said tenants shall appear; and in case they shall neglect to appear, the said *William Creed* may appear by himself, and defend his title to the premises, he hereby consenting to enter into the like rule that the tenants, in case they had appeared, ought to have done." And it was further ordered, that *Creed*, upon the trial, should *admit himself to be in the actual possession* of the premises sought to be recovered.

As the tenants or occupiers did not defend, judgment was signed against them, and the lessors of the plaintiff in the first ejectment having proved the judgment, *elegit*, seisin, and inquisition, &c., it was insisted for the defendant (after several objections to the inquisition), that the lessors of the plaintiff could not be intitled to recover, as they had not proved that the tenants in possession had been served with notice to quit.

(a) Amounting together to 68*l.*

The learned Judge, considering the objection to be well founded, directed a nonsuit.

In the second action it was proved, that *Chinn* had, previously to the judgments and *elegits*, given a notice to the tenants in possession, that he had sold the premises to the defendant, and desired them to attorn and become tenants to him; and that they had attorned accordingly, and had since paid their rents to the defendant's agent, and took the defendant's receipts for the same; on which it was submitted, that this was a sufficient evidence of disclaimer by the tenants, to render a notice to quit to them unnecessary; but it was insisted, that the inquisition on the second *elegit* was void, on the ground, that, the judgments being at the suit of different plaintiffs, the Sheriff ought not to have extended and delivered to the lessors, the whole of the remaining lands of *Chinn*, but only a moiety of such remainder. The learned Judge expressed no opinion upon the point, but allowed the cause to proceed, stating, that the objection might, if considered of any weight, be mentioned to the Court. The defendant then set up a deed of conveyance from *Chinn* to him, purporting that the former had, in *April*, 1825, sold his life estate in the premises to the defendant, in consideration of 500*l.*; but it being clearly proved that this transaction was altogether fraudulent, and with a view to defeat the judgment creditors, the lessors of the plaintiff having obtained a verdict on *Chinn's* bond, in the month of *March* preceding, the Jury found a verdict for the plaintiff.

Mr. Serjeant *Andrews*, in the last Term, obtained a rule *nisi*, on behalf of the lessors of the plaintiff in the first action, that the nonsuit might be set aside, and a verdict entered for them instead thereof, or that a new trial might be granted, on the ground, that, under the circumstances, it was not necessary to serve a notice to quit on the tenants in possession, previously to the commencement of that action.

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Mr. Serjeant *Ludlow*, on the same day, obtained a rule nisi, that the verdict for the lessors of the plaintiff in the second action might be set aside, and a nonsuit entered, on the grounds—*First*, that, on the *second* inquisition, the Sheriff delivered less than a moiety of the total annual value of *Chinn's* lands, which amounted to 152*l.*, one moiety thereof, *viz.* 76*l.* having been delivered under the first inquisition; whereas only the value of 68*l.* was delivered under the second; and as the Sheriff had a limited authority, he could not deliver more or less than a moiety under each inquisition. *Secondly*, that the inquisition did not set out by metes and bounds, what the particular lands or hereditaments were, that were to be delivered to the lessors of the plaintiff; and Mr. Serjeant *Williams*, in a note to the case of *Underhill v. Devereux*, says (a): “The inquisition ought to find the lands with convenient certainty; for, to find no certain estate will be insufficient: and, after the inquisition is taken, the Sheriff must deliver a moiety by *metes and bounds*, and if he do not, the inquisition is bad, and may be quashed for uncertainty.” And *lastly*, that, as the inquisition on the first *elegit* stated a delivery by the Sheriff of a moiety of the whole of *Chinn's* lands to *Cheese* and *Davies*, and the inquisition on the second recited that fact, and then stated the delivery of the other moiety to *Davies*, and *E. W.* and *J. Cheese*, such inquisition was void; as only a half of the second or remaining moiety of the lands should have been delivered, and not the whole. And the cases of *Burnham v. Bayne* (b), *Huyt v. Cogun* (c), *Morris v. Jones* (d), *Tidd's Practice* (e), and *Archbold's King's Bench Practice* (f), were referred to; and in the latter work it is said, “that, if two persons have judgments against a defendant, and one of them have a moiety of the

(a) 1 Wms. Saund. 69 a, n. (2).

Barn. & Cress. 243.

(b) 2 Brownl. 97.

(c) 9th Edit. Vol. 2, 1035.

(c) Cro. Eliz. 482.

(f) Vol. 1, 300.

(d) 3 Dow. & Ryl. 603; S. C. 2

lands delivered to him upon an *elegit*, the other, upon suing out an *elegit* afterwards, can only have a moiety of the moiety which remained to the defendant; and, if more than a moiety of the residue be extended under the second writ, the inquisition will be void."

The Court granted the rule on the last objection only, as they thought the first to be altogether untenable; and, with respect to the second, they were of opinion that the premises were set out with *sufficient certainty*, which was all that could be required from the Sheriff; and they ordered that both the rules should come on for argument at the same time.

Mr. Serjeant *Andrews*, in support of his rule for setting aside the nonsuit, and having a new trial, submitted, that there was no ground whatever for the objection raised by the defendant, as to the necessity of proof of a notice to quit being served on the tenants in possession, and, as they did not defend, judgment was signed against them by default. Besides, *Creed* defended as landlord, and, by the terms of the rule, was to admit himself in *the actual possession* of the premises. He, therefore, could not object to the want of a notice to quit to the occupiers or tenants in possession, as they had relinquished their right to take such an objection, by suffering judgment to be signed against them. The defendant, therefore, having stipulated to admit himself in the actual possession, and to defend as landlord, he was bound to rely on his own title alone; and the lessors of the plaintiff might not have intended to dispute the claim of those occupying under him; for the present action was commenced against the defendant for the sole purpose of trying his title, as it was founded on an alleged conveyance from *Chinn*, which the Jury found to be fraudulent. The title of the defendant under *Chinn*, was adverse to the plaintiff's; and, where a possession is adverse, a notice to quit cannot be

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required; for, in *Doe d. Foster v. Williams* (a), the plaintiff claimed as nephew and heir to the person last seised, and the defendant, who was landlord of the premises, was set up to defend instead of the tenant; the landlord, therefore, claimed adversely against the plaintiff, as in this case; and it was objected for the defendant, that, to entitle the plaintiff to bring an ejectment, he ought to have given the tenant notice to quit. But, Lord *Mansfield* observed: "The answer given to that, at the trial, was, that the possession was adverse, and therefore no notice was necessary;" and, said his Lordship: "I am clearly of opinion, that there was no occasion for a notice; for the possession of the tenant was connected with that of the landlord, which was adverse." That case is precisely in point; and here the tenants received notice from *Chinn*, their landlord, to pay rent to the defendant, which they accordingly did; and a late rule of all the Courts requires (b), that the defendant in ejectment must specify in the consent rule for what premises he intends to defend; and, if he defend as landlord, that his tenant was, at the time of the service of the declaration, in the possession of the premises. The defendant, therefore, as landlord, must rely upon his own title, as he was allowed to defend with a view to protect that title alone.

With respect to setting aside the verdict for the lessors of the plaintiff in the second action, and entering a nonsuit, on the ground that the inquisition on the second *elegit* was void, for delivering the remainder, instead of a moiety of the moiety of *Chinn's* lands, there is no colour for the objection. Both the judgments, and the *elegits* issued thereon, were not only of the same term, but were obtained and tested on the same day; and, as they were delivered to the Sheriff at the same time, the inquisitions

(a) Cowp. 621.

Barn. & Ald. 196; 5 B. Moore,

(b) Mich. Term, 1820. 4 310.

on both were properly taken together. Although in *Burnham v. Bayne*, it was held, that, upon a second *elegit*, only a moiety of the remaining moiety shall be extended; yet, there, a moiety of the land was first extended upon the first judgment, and *after* such judgment all the residue was extended. There, the judgments were not only obtained at the suit of different plaintiffs, but at different times. So, in *Huyt v. Cogan*, where two persons recovered severally, he who had the first judgment first sued out an *elegit*, and thereupon had the moiety of the lands of his debtor delivered to him; and *afterwards* the other sued out an *elegit*; and it was held, that the Sheriff should deliver but the moiety of that moiety which he had at the time of the writ awarded. Here, however, the defendant had the whole of the property at the time the writs of *elegit* were sued out and delivered to the Sheriff; and, for any thing that appears to the contrary, the judgments in *Burnham v. Bayne* and *Huyt v. Cogan*, might have been of different terms. But the case of the *Attorney-General v. Andrew* (a) is an authority expressly in point. There, a creditor had obtained two judgments *in the same term*, and sued out two *elegits* thereon; on the one *elegit*, the Sheriff extended one moiety of the land, and on the other, the other moiety; and it was contended, that only a moiety could be extended on one judgment, and a moiety of the remaining moiety on the other. But the Court held the execution to be good; and Mr. Baron *Parker* said, that two moieties might be extended upon two judgments, and cited *Crook's case* (b); and Mr. Baron *Nicholas* held the execution to be well, because the judgments, being of the same term, were of equal date; and Chief Baron *Steele* held the extents well executed, because both judgments were in the same term, which is but one day in

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(a) *Hardres*, 23.(b) *Pasch*, 13 Jac. B. C. Rot. 121.

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law; and Lord Chief Baron *Comyns*, in referring to these three cases, draws the true distinction, and says (a): "If two have judgment, and one sues an *elegit*, and has a moiety, and *afterwards* the other sues an *elegit*, the Sheriff shall deliver but a moiety of the residue; yet, if both judgments are of the same term, which is but one day in law, each may take a moiety of the whole." A writ of *elegit* commands the Sheriff to deliver to the plaintiff a moiety of the lands of which the defendant was seised on the day judgment was given. If, therefore, two writs of *elegit* be delivered to the Sheriff together, on judgments obtained on the same day, he must deliver to each party an equal moiety of the whole of the lands of which the defendant was then seised or possessed.

Mr. Serjeant *Ludlow, contra*. The lessors of the plaintiff were properly nonsuited in the first action, as no previous notice to quit was proved to have been given on the tenants or occupiers of the premises. They were in possession before the title of the lessors of the plaintiff accrued, which was founded on the judgments upon which the writs of *elegit* were sued out. It is quite clear, that the rights or interests of the tenants might be affected, in case the lessors of the plaintiff recovered, as they might proceed to execution against them. Besides, as the lessors claimed through *Chinn*, they could not stand in a better situation than he did; and, as those who occupied under him were tenants from year to year, he could not have ejected them without a previous notice to quit. The lessors of the plaintiff should, at all events, have shewn a right to put an end to the existing tenancy; and although the occupiers might have paid rent to the defendant, yet it was not in the nature of a disclaimer, as *Chinn* was their original landlord, and he

(a) Com. Dig. tit. "Execution," C. 14.

gave them notice that he had disposed of all his interest in the premises to the defendant. *Secondly*, the inquisition on the second *elegit* was void, as the Sheriff returned that he had delivered the remaining moiety of *Chinn's* lands to the lessors of the plaintiff in the second action; whereas, he should have delivered but one half of that moiety; for, from the case of *Huyt v. Cogan* to the present day, it has been determined, that, if two persons have separate judgments against the same defendant, and one of them have a moiety of the defendant's lands delivered to him upon one *elegit*, the other, upon suing out a second *elegit*, can only have a moiety of the moiety which remained after the execution of the first; and the only authority to the contrary is that referred to by Chief Baron *Comyns*, in *Fitzherbert's Abridgment* (a), where the compiler expressed his astonishment by the words "*quod mirum fuit.*" In *Morris v. Jones*, a moiety of the defendant's lands having been taken to satisfy a judgment under one *elegit*, and the whole of the remainder, instead of the moiety of a moiety, under a second *elegit*, it was held that the latter writ was a mere nullity, and that there was no occasion to apply to the Court to set it aside. Although, in the *Attorney-General v. Andrew*, it was decided, that if there be two judgments and two writs of *elegit* sued out during the same term, a moiety of the defendant's lands may be delivered under the one, and the remaining moiety under the other; yet, there, the judgments were obtained by the same party; and that case proceeded on the principle, that, in judgment of law, the whole term is but one day. In *Viner's Abridgment* (b), Lord Chief Justice *Holt* said: "If there be two judgments, and the defendant is seised of twenty acres, and a moiety of them is extended upon one, and an extent goes upon the other, and inquisition thereupon finds

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(a) Tit. "Execution," pl. 137. (b) Tit. "Execution," M (a) 4, pl. 23.

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him seised of twenty acres, *without any notice of the former extent*, and hereupon the other moiety is extended, this is well, though, in truth, a moiety of the remaining moiety ought to be extended; and the case of *Pullen v. Purbeck* (a), is referred to in support of that doctrine. Here, however, as the inquisition on the second *elegit* recited the inquisition on the first, the Sheriff thereby admitted that he had notice of the former *elegit*, and accordingly stated, that a moiety of all the defendant's lands had been already extended under it; the Sheriff, therefore, ought only to have delivered to the creditors under the second writ, the moiety of the residue of the lands, the judgments having been obtained, and the writs sued out, at the instance of different parties and separate creditors.

Lord Chief Justice BEST. — The application by the defendant, to set aside the verdict found for the lessors of the plaintiff in the second action of ejectment, is founded on the objection, that the inquisition on the second writ of *elegit* is void, on the ground that the Sheriff has stated, that he had delivered to the lessors of the plaintiff in that suit, the whole, instead of the moiety of the second moiety of *Chinn's* lands; the inquisition having previously recited that the first or other moiety of such lands had, on the same day, been extended by the Sheriff, and delivered over to the lessors of the plaintiff in the first action. Now, if the Sheriff could only extend and deliver a moiety of the latter moiety to the lessors of the plaintiff in the second action, the objection must prevail, and a nonsuit be entered; but I am clearly of opinion, that there is no ground whatever for this objection, as the lessors of the plaintiff in the second action, had, under the circumstances, a right to have the whole of the remaining moiety of *Chinn's* lands delivered to them. The writ of *elegit* is

(a) 12 Mod. 361.

given by the statute *Westminster 2nd*, c. 18, the words and object of which are most accurately set out by Lord Chief Baron Comyns, in treating of execution by *elegit*, as follows (a): "Upon judgment or recognizance, *sit in electione* of the plaintiff, *quod vicecomes fieri faciat de terris et catallis, vel quod liberet omnia catalla (exceptis bobus et asinis carucae) et medietatem terræ quousque debitum fuerit levatum per rationabile pretium et extantum.*" It is true, that, by the words of the writ, the Sheriff is only to take a moiety of the lands. But the question is, to what time do those words relate. I am of opinion that they relate to the time of the issuing of the writ. The Sheriff must take, on each writ, a moiety of the lands which the party against whom the writ is sued out is possessed of at the time it is issued. Now, at the time the two writs in question were issued, the defendant had the whole of the lands as found under the inquisitions; and the Sheriff had a right, nay, was bound, to take a moiety under each writ. Under the first *elegit*, he very properly took and delivered a moiety of the whole of the lands, and the other moiety was all that remained. But the whole of the property belonged to the defendant on the day the writs were issued and delivered to the Sheriff; and although several cases might have been cited to shew, that the Sheriff could only take a moiety of the remaining moiety, if the second *elegit* had been sued out at the instance of a different creditor in a *subsequent term*, yet, as, in this case, both judgments were signed, and both writs were actually issued on one and the same day, the Sheriff might take a moiety under each, as the defendant was then in the possession of the whole of the property. This appears not only to be consistent with principle and common sense, but in accordance with previous authorities; and there appears to be no

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difference whether the writs be sued out at the instance of the same or of different plaintiffs, provided they be dated on the same day, or have relation to the same term; and here it appears that both the writs were not only dated and tested, but delivered to the Sheriff to be executed, on the same day: so, the judgments on which the writs were founded, were both signed on the same day, and the inquisitions were afterwards taken together. If, therefore, it was the duty of the Sheriff to take a moiety of what the defendant was possessed of, under each writ, at the time it issued, he would, of course, take one moiety under the one writ, and the remaining moiety under the other. This is the conclusion to which I should have arrived, if I had been referred to no previous authority on the subject. The cases of *Huyt v. Cogge*, and *Burton v. Bayne*, are both referred to by Lord Chief Baron Comyns, who, with his usual accuracy, deduces the principle from them to be, that, if two persons have judgment, and one sues an *elegit*, and has a moiety, and afterwards the other sues an *elegit*, the Sheriff shall deliver but a moiety of the residue; yet, that, if both judgments are of *the same term*, which is but one day in law, each may take a moiety of the whole; and he refers to the case of the *Attorney-General v. Andrew*, as supporting that distinction. That case, therefore, must be considered as an authority, and appears to me to be expressly in point; and, as it was approved of by Chief Baron Comyns, we may now take it as our guide, especially as it is accordant to justice, and in conformity with the terms of the writ, and the statute on which it is founded. The rule, therefore, for setting aside the verdict found for the lessors of the plaintiff in the second action, must be discharged; and, as the question, whether the tenants or occupiers were entitled to a notice to quit, in the first action, embraces a point of practice, we will take time to consider of it.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurred.

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Mr. Justice GASELEE.—There can be no doubt but that the merits in both causes were with the plaintiffs; and I wished, at the trial, that all the objections should be brought before the Court. It was said, that, as the writs of *elegit* were sued out on distinct judgments, by different parties, the Sheriff could only take the moiety of the remaining moiety of the defendant's property, under the second, a moiety of the whole having been extended and delivered under the first. But I can find no distinction between *elegits* sued out on two or more judgments at the suit of the same plaintiffs, and *elegits* on several judgments issued at the instance of several plaintiffs, provided such writs be sued out at the same time, on judgments obtained in the same term; for, if a party, who lends money, takes two several warrants of attorney from the borrower, the one for a part, and the other for the residue of the sum advanced, and enter up two several judgments thereon of the same term, it seems that he may take the whole of the defendant's lands under them (a); and, if he may do so, I see no reason if two parties obtain judgments, and sue out writs of *elegit* thereon, on the same day, why the Sheriff may not take a moiety of the lands under the one, and the remaining moiety under the other. If the case referred to in *Fitzherbert's Abridgment* could be considered as an authority standing by itself, and there were no other subsequent decision, the question would require great consideration; but the case of the *Attorney-General v. Andrew*, appears to me to be expressly in point, and which has been since recognized by several, if not all, our text writers, as establishing the principle, that, if a defendant acknowledge two judgments to a plaintiff, and,

(a) See Gilbert on Executions, 55-6.

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in the same term, he take out two *elegits*, he may have a moiety of the defendant's lands delivered to him on the one, and the other moiety on the other, and is not restrained to a moiety of a moiety on the latter writ, for that, in judgment of law, the whole term is but one day; and I cannot distinguish that from a case where two judgments are sued out at the instance of several plaintiffs, provided such judgments be obtained, and the writs of *elegit* thereon be sued out, on the same day, and in the same term. In *Tidd's Practice* (a), the distinction is thus taken, viz. that if A. and B. recover several judgments against C., of different terms, and A. sue out an *elegit*, and have a moiety of C.'s lands delivered to him, and then B. sue out an *elegit*, the Sheriff, it seems, can only extend a moiety of the remaining lands. And for that *Croke Elizabeth* (b), *Hardres* (c), *Bacon's Abridgment* (d), and *Gilbert on Executions* (e), are cited, and a reference is also made to *Patch on Mortgages* (f). But that, if A. have two judgments against C. of the same term, and take out two *elegits*, on the one, he may have a moiety of the whole, and, on the other, the other moiety, and is not restrained on the latter to a moiety of the moiety; for, in judgment of law, the whole term is but as one day; and for that *Hardres* (g) is cited. Mr. Impey, in his *Office of Sheriff*, also refers to the case of the *Attorney-General v. Andrew*, as establishing the doctrine for which it has been now cited. By the writ of *elegit*, the Sheriff is commanded to deliver to the plaintiff all the goods of the defendant in his bailiwick, and also a moiety of all his lands and tenements, whereof, on the day judgment was given, or ever afterwards, the defendant was seised. Now, the Sheriff would have been guilty of a neglect of duty, if he had not returned the whole of the lands the defendant had on the day the two judgments

(a) 9th Edit. 936.

(d) Vol. 2, 350

(f) 293, 294.

(b) 483.

(e) 55, 56.

(g) 23.

(c) 23, 27.

were signed; and, as the writs of *elegit* were issued on that day, the Sheriff was right in extending, under each writ, a moiety of what the defendant was then seised of. The rule, therefore, in the second action, must be—

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Lord Chief Justice BEST now said, that, in the first ejectment, there could be no doubt but that the merits of the cause were with the lessors of the plaintiff; that the rule for setting aside the nonsuit must be made absolute; and that there must be a new trial, the costs to abide the event.

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Rule absolute accordingly (a).

(a) The effect of this decision tenants in possession was unnecessary, that the notices to quit to the necessary.

HUDSON v. REVETT. *5 May 26th.*

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THIS was an issue directed by this Court in the last Trinity Term, to try whether certain deeds of lease and release, bearing date the 25th and 26th of November, The defendant, being confined in prison for debt, at the suit of the plaintiff and another cre-

ditor, executed deeds of lease and release, and also an accompanying deed of trust, by which he conveyed all his property to the plaintiff, in trust to sell for the benefit of the defendant's creditors, the surplus, if any, to be paid to the defendant. The deeds also contained a covenant for the defendant and his wife to levy a fine to enure to the uses of the trust deed; and the trustee was, in the first place, to pay and defray all the costs and expenses of executing the deeds. At the time of the execution by the defendant, a blank was left in the trust deed, for the amount of the sum due to the creditor at whose suit the defendant was in custody; and the amount having been ascertained by vouchers produced by the defendant, the blank was filled up on the following day, in his presence and with his assent. He afterwards recognized and confirmed the deeds, by joining his wife in levying the fine, and desiring his tenants to pay the rents to the plaintiff:—*Held*, that the deed of trust was valid, although the blank was not filled up until after the execution.

On an issue directed, by the Court of Common Pleas, to try whether the deeds were valid or not, the attorney who prepared them on the retainer of the trustee, was held to be a competent witness to prove the execution by the defendant, and the filling up the blank in question, although the witness was a party to the trust deed, and was entitled to his costs for preparing the instruments, and although he was a party in another suit, where his defence rested upon the trust deed.

Where deeds of lease and release, and a deed of trust, conveying property for the benefit of creditors, form but one transaction or assurance, the lease and release do not require an *ad valorem* stamp, as they fall within the exception of a conveyance for the benefit of creditors, in the statute 55 G. 3, c. 184, sched. part 1, tit. *Mortgage*.

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1825, and an accompanying deed of trust, dated on the latter day, were the deeds of the defendant; and, if so, whether they had been obtained from him by fraud, covin, or misrepresentation.

At the trial, before Mr. Justice *Hobroyd*, at the last Assizes for the county of *Suffolk*, it appeared, that, by the deeds in question, the defendant conveyed all his estates in the county of *Suffolk* to the plaintiff, upon trust for the benefit of the defendant's creditors, and, among others, to secure certain debts due from him to the plaintiff and one *Mills*. By the deeds of lease and release (after reciting certain debts and incumbrances), the defendant's estates were conveyed to the plaintiff, in trust for sale, and that he should stand possessed of all monies arising therefrom, upon certain trusts, to be declared in a deed to be executed immediately after the execution of the deeds of lease and release: and, by the terms of the deed of trust, the plaintiff, as trustee, was, in the first place, to pay and defray the costs, charges, and expenses of all parties thereto, attending the preparing, settling, completing, and executing the deed of trust, and the several indentures of lease and release therein referred to; and, in the next place, to pay to one *Robert Browne*, a party to the deed of trust, all costs, charges, and expenses, which should be incurred or sustained in making and completing the sale of the estates, of which he, *Browne*, was to be the receiver and manager. There was an ultimate trust, as to the surplus, if any, of the monies arising from the sale of the estates, after the payment of debts, in favour of the defendant. The deeds of lease and release also contained a covenant on the part of the defendant and his wife, to levy a fine to the plaintiff, to enure to the intents and purposes of the trust deed. *Browne* was called as a witness, and on his stating that he was the attorney who prepared the deeds, and that he was a party to the deed of trust, and had acted under it, his testimony was

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objected to, on the grounds, that he had an interest to support the deeds, for the purpose of being paid his costs for preparing them; or that, at all events, he had an equitable claim on the monies arising from the sale of the estates, to defray the expenses attending such sale. Besides, he was made a co-defendant in an action of trespass brought by *Revett*, the present defendant, for breaking open and entering a chapel, of which he, *Browne*, had taken possession, under the terms of the trust deed (a). The learned Judge, however, was of opinion, that, as the plaintiff, as trustee, was liable to pay *Browne* personally, having retained and employed him to prepare the deeds, the latter must be considered as his agent for that purpose; and that *Browne's* testimony was admissible, although he might have an interest in proving the due execution of the trust; that the deeds did not give *Browne* a higher security for his costs; and, therefore, that they could not be used in evidence in support of his claim on the plaintiff for such costs. The learned Judge also said, that he could not take into consideration the nature of *Browne's* equitable claim on the estates, or the effect of his being made a co-defendant in a former action. His evidence was accordingly admitted. *Browne* then stated, that, on the 14th November, 1825, he was employed, as an attorney, on the part of the plaintiff and *Mills*, creditors of the defendant, to prepare certain deeds, by which the estates of the latter were to be conveyed to the plaintiff, in trust to sell, for the payment of the defendant's debts; that he accordingly prepared drafts of the deeds in question; and that, on the 24th November, he, accompanied by *Mills*, went to the *King's Bench* prison, where the defendant was confined at the suit of the plaintiff and *Mills*; that the drafts of the deeds were then read over to the defendant in the presence of *Mills*; and that, after certain alterations had been made in the drafts, they were signed by

(a) See *Revett v. Browne and Others*, ante, p. 12.

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the defendant and *Mills*; that, on *Monday*, the 28th *November* following, *Browne*, accompanied by a late clerk of his, again went to the prison, and took the deeds in question, which had been engrossed *verbatim* from the drafts, for the purpose of having them executed by the defendant; that, on his being told that they corresponded with the drafts, he said that there was no occasion to have them read over to him; that blanks were left in the deed of trust, for the amount of sums due from the defendant to his creditors, which were, previously to its execution, filled up, with the exception of the amount of the debt claimed by *Mills*, who was then present, and produced an account stating that the defendant was indebted to him in a sum exceeding 16,000*l.*; that the defendant disputed this amount, and produced a counter account, reducing *Mills's* debt to 14,858*l.* 8*s.* 8½*d.*, and said that he had vouchers to confirm such account, which he undertook to produce on the following day; that it was then agreed that blanks should be left in the trust deed for *Mills's* debt, subject to the production of such vouchers, and that they should be filled up when they were produced; that *Mills* and the defendant then executed the deeds, leaving blanks at four several places in the trust deed, for the insertion of the sum due to *Mills* when ascertained; and that the defendant requested that it might be done. The testimony of *Browne* was confirmed, as to these facts, by his late clerk, who accompanied him to the *King's Bench*, and attested the execution of the deeds, and who was the only person present, with the exception of *Browne*, the defendant, and *Mills*. *Browne* then proceeded to state, that, on the following day, *viz.* the 29th *November*, he and *Mills* again called on the defendant, at the *King's Bench* prison, when the latter produced the vouchers above referred to, on which a balance was struck; that the amount of *Mills's* debt was agreed to both by him and the defendant; that the witness *Browne* then filled up the blanks in the trust deed with

the above sum of 14,858*l.* 8*s.* 8*d.*; and then left the prison, and took away all the deeds with him, for the purpose of having them executed by the plaintiff and the other necessary parties. But it appeared that the plaintiff did not execute the trust deed until the latter end of *December* following.

A letter written by the defendant to *Moss*, one of his tenants, dated the 29th *November*, 1825, was then given in evidence. It was as follows:

“Sir,—Having this day executed to Mr. *Thomas Hudson* (the plaintiff), a conveyance of all my estates and hereditaments, in trust for the purpose of satisfying various charges and incumbrances on my property, I write to desire that you will in future pay your rents to the said *Thomas Hudson*, or his appointed receiver, whose receipt will be a sufficient discharge.”

Similar letters, dated on that day, were proved to have been sent to all the other tenants; and a letter was put in, written by the defendant to the steward, requesting him to deliver over the court-rolls and books of the manor to *Browne*, assigning as a reason, that it had been conveyed by him (the defendant) to the plaintiff, for whom *Browne* was the attorney. It also appeared, that, shortly after the execution of the deeds, the defendant was discharged from prison, the plaintiff and *Mills* having executed releases of their demands on him; that, in the latter end of *December* following, the defendant's wife executed the deeds in his presence; and that a fine was levied by them in *Hilary* Term, 1826, to enure to the uses of the trust deed. A witness of the name of *Chapman* also proved, that, in *December*, 1825, he saw the defendant at one of his tenants' houses in *Suffolk*, and that he told him that he had assigned his estates to the plaintiff; that the defendant was then reading a deed, which he said was a copy of that which he

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had executed; that he had obtained time by it; and that he had produced vouchers by which he had reduced *Mills's* debt from upwards of 16,000*l.* to 14,885*l.*

No witnesses were called for the defendant, nor was any evidence offered on his behalf. But it was objected for him—*First*, that, where a deed between several parties is executed by them, and a blank is left in a material part, although it be afterwards filled up with the concurrence of all the parties interested, it is no longer the deed of the executing parties, but is altogether a void instrument; and that, as blanks were left in the trust deed for the amount of the sum due to *Mills*, at the time of the execution by the defendant, the deed was void as against him, although the amount was afterwards inserted with his consent; and that parol evidence of his assent to such alteration, after the execution, was inadmissible; for, in *Buller's Nisi Prius*, it is said (a), “If there be blanks left in an obligation, in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered: as, if a bond were made to C. with a blank left after for his christian name, and for his addition, which is afterwards filled up.” *Secondly*, that, as the deeds of lease and release conveyed the legal estate to the plaintiff, to sell, and out of the produce to pay the debts and incumbrances, they required an *ad valorem* stamp within the statute 55 *Geo. 3*, c. 184, Sched. Part 1, tit. *Mortgage*, by which “any conveyance of lands, estate, or property whatsoever, in trust to be sold, or otherwise converted into money, which should be intended only as a security, and should be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, must be stamped with a progressive duty.” And, as the trust deed was, under the circumstances, void, the exception as to a conveyance for the benefit of credi-

(a) 7th Edit. by Bridgman, 267.

tors generally who should exceed five in number, could not apply to the deeds of lease and release, as they were not named therein; and although, where several distinct deeds or instruments made at the same time, or for one and the same purpose, shall be chargeable only with one stamp; yet, where the instruments are to operate as a conveyance, either by way of mortgage, or in trust for sale, an *ad valorem* stamp is necessary.

The learned Judge told the Jury, that the only question for their consideration was, whether the deeds of lease and release, and the accompanying deed of trust, all of which were actually executed by the defendant on the 28th November, 1825, were his deeds, and, if so, whether either, or which of them, had been obtained by fraud or misrepresentation; that no substantial ground of objection had been raised to the deeds of lease and release, which conveyed the estate to the plaintiff upon certain terms declared in the trust deed; that, although it had been said that that deed was void, on account of the blanks left for the insertion of the sum due from the defendant to *Mills*, on the authority of a passage in *Buller's Nisi Prius*, yet it did not appear there that the blanks were filled up *in the presence of the party*; and that, if it were done in his absence, and the instrument had not been shewn him subsequently to the execution, there could have been no re-delivery; but that, if, in such a case, there was that which amounted to a re-delivery, or any circumstances to shew that the party meant that the deed should be acted upon in its altered state, and that the alterations were made in the presence and with the assent of the party, it would amount to a re-delivery, and the deed would be his, as his subsequent assent to the alterations in his presence would be equivalent to a re-delivery; for, in *Goodright d. Carter v. Straphan (a)*, where a *feme covert* delivered a deed during her husband's life-time,

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(a) Cowp. 201.

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which was void, and re-delivered the deed after his death, it was held to be a sufficient confirmation of such deed, so as to bind her, without its being re-executed or re-attested; as certain circumstances might of themselves be equivalent to a re-delivery, so as to render the deed operative, in point of law. And Lord *Mansfield*, after referring to *Perkins* (a), said, "The question is, whether circumstances may not be equivalent to a delivery, without actual delivery? Lord *Coke*, in his commentary on *Littleton*, says (b): "As a deed may be delivered to the party without words, so a deed may be delivered by words, without any act of delivery." So, here, the only question was, whether the facts, as proved by *Browne*, amounted to a re-delivery. The deed of trust was a valid deed, although blanks for the sum due from the defendant to *Mills*, were left in it at the time of the execution; for it was then agreed and assented to by the defendant that the blanks should be filled up when the amount of the debt was ascertained; and the sum was not inserted at the time, because the defendant himself claimed a deduction; and on the following day, he having produced certain vouchers, which he had undertaken to do, the deduction was allowed, and the sum was inserted accordingly in his presence, and with his assent. The deeds were afterwards taken away by *Browne*, who acted as the attorney for all parties, for the purpose of their being executed by others; and the defendant himself afterwards saw his wife execute them, and actually joined with her in levying a fine to enure to the purposes of the trust deed. And, not only this, but, on the day the sum was inserted in the trust deed, he wrote to his tenants desiring them to pay their rents to the plaintiff, to whom he said he had conveyed his estates in trust for certain purposes, thereby recognising and confirming the deed of trust, and treating

(a) Section 154.

(b) Page 36.

it as a valid instrument. The question, then, is, did not these facts amount to a confirmation of the deed? The learned Judge, eventually, intimated it as his opinion, that, unless the Jury disbelieved the evidence adduced for the plaintiff, there was abundant ground for them to consider that the deeds were the deeds of the defendant, and that there was no evidence whatever to shew that either of them had been obtained by fraud or covin; that, if they had been, it was incumbent on the defendant to have proved it, or it should have been shewn on cross-examination of the plaintiff's witnesses.

The Jury found that the deeds were the deeds of the defendant, and that the execution of them had not been obtained by any fraud, covin, or misrepresentation: and they accordingly gave a verdict for the plaintiff.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the grounds—*First*, that *Browne* was improperly admitted as a witness. *Secondly*, that the deeds of lease and release ought to have had an *ad valorem*, and not a common deed stamp; and also that the deed of trust ought to have had a new stamp when the blanks were filled up, as it had been completely executed by *Mills* and the defendant on the preceding day—and, *Lastly*, that there was no evidence of a re-delivery or re-execution of the latter deed by the defendant; that a re-delivery could not be presumed; and that, although it might have been proved, or inferred by the subsequent acts of the party, yet here, there was sufficient evidence to rebut that presumption, as the deed was never in the possession of the defendant, but remained in the custody of *Browne*, who held it adversely to the defendant's interest; and it was, at all events, void, as it was altered materially by the blanks having been filled up after it had been executed by the defendant and *Mills* on the previous day, when it was a complete and perfect deed.

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Mr. Serjeant *Storks*, and Mr. Serjeant *Russell*, now shewed cause.—The Jury have, in point of fact, expressly negatived fraud or covin in the execution of either of the deeds in question. The only point, then, is, whether, from what took place at the time of the execution, on the 28th *November*, coupled with the subsequent acts of the parties, the trust deed can be considered as void; or whether it is now open to the defendant to impeach its validity. The blanks would have been filled up previously to or at the time of the execution, if they had not been left at the instance of the defendant himself; they remained for his benefit alone, and he not only fixed the time when they should be filled up, but expressed his assent to the insertion of the sum due to *Mills*, which was established by the defendant's own vouchers; and, as he confirmed all the deeds by several subsequent acts, it must be now assumed, not only that the blanks were filled up with his assent, but according to the previous intention and express understanding of the parties: and, if so, there was no material alteration of the deed, but merely a completion of it. This case, therefore, may be distinguished from those where alterations or interlineations were made after an execution of the instrument by all the contracting parties, if the person to be bound *be not present, or do not express his assent at the time of such alterations*. The acts of the parties manifestly shew that the trust deed was only *in fieri* at the time of the meeting on the 28th *November*, and that it was not to be completed until the following day; and, if so, it must be considered still to remain the deed of the parties, although it were not actually re-delivered or re-executed by the defendant after the blanks were filled up. In *Coke Littleton* it is said (a): “That, as a deed may be delivered to the party without words, so may a deed be delivered by words, without any act of delivery.” In

(a) Page 36 a.

Thoroughgood's case (a), where one party said to another, "Here, I deliver you this writing," it was held to be a good delivery thereof to take effect as a deed. Here, too, until the blanks were filled up, the trust deed must be considered as being in the custody of *Browne*, as an *escrow*: and, according to the case of *Goodright v. Straphan*, it is evident that circumstances alone may be equivalent to a re-delivery. Although a *dictum* is there cited from *Perkins*, that, "if a man in prison make a deed, and deliver the same as his deed, and afterwards, when he is at large, deliver again the same deed as his deed, which he delivered before as his deed, this second delivery is void;" yet it must be assumed that there the deed was a perfect deed at the time of the first delivery: whilst here, the trust deed was incomplete until certain blanks were filled up; and, as the postponement took place at the request of the defendant himself, he must be bound by the deed, although there was not a formal re-delivery, and particularly, as he afterwards confirmed it by various solemn acts. With respect to the passage relied on at the trial, in *Buller's Nisi Prius*, that, if blanks be left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered:—*Pigot's* case (b), is relied on as an authority in support of that position; but, on referring to *Rolle's Abridgment*, it is there said: "That, if a deed *be altered* in a point material by the plaintiff himself, or by a stranger, *without the privity of the obligee*, be it by interlineation, addition, rasure, or by drawing of a pen through the midst of any word, the deed by this becomes void, for it is not now the same deed; as, if an obligation be made to a Sheriff to appear, &c., and in the obligation the name of the Sheriff is omitted, and, after the delivery of it, his name is interlined, either by the obligee, or a stranger *with-*

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(a) 9 Rep. 137 b.

(b) 2 Rolle's Abr. 29, pl. 2, 3, tit. "Fruits," Interliner (U).

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out his privity, yet the deed is void by it; but, if the deed be interlined in a thing not material, by a stranger, without the assent of the obligee, this shall not make the obligation void." And *Pigot's* case (a) is referred to by *Rolle* as establishing the points there laid down. In that case, however, the alteration was made subsequently to the *completion* of the bond, and after it was delivered by the party as his act and deed. Besides, the alteration was not in the contemplation of the parties at the time of the delivery, and the words in the condition were inserted without the sanction or privity of the Sheriff; and the ground on which that case was decided, was, that the interlineation was made by a stranger, without the assent or privity of the obligee; and as the addition was not material, the Court held that it did not render the bond void. The instance, therefore, put by Mr. Justice *Buller*, that a bond made to C., with a blank left for his christian name, and for his addition, which is afterwards filled up, is void, is not supported by *Pigot's* case, where the bond was altered by a stranger, and without the privity of the obligee; whilst here, the blanks were left in the deed at the time of its execution, with the assent of all the parties, and at the instance of the defendant himself, and the deed was afterwards completed in conformity thereto. In *Markham v. Gonaston* (b), where A., at the request of B., was bound in a statute with B. to C. as his surety, and upon this B. caused D., his servant, to make a counter-bond, in which he and E. were bound to A., to save him harmless from the said statute, and B. commanded his servant to leave out of the condition of it the christian name of C., the place of his residence, the county, and his addition, and the servant did it accordingly, and afterwards E. sealed and delivered the counter-bond as his deed, to the use of A.; and afterwards the servant, by the command of B., and with the assent of E., inserted, in the spaces or blanks, the

(a) 11 Rep. 27.

(b) Cro. Eliz. 626.

christian name of *C.*, the place of his residence, and county, and his addition; and afterwards *B.* sealed and delivered the obligation: it was held to be a void obligation against *E.*, by the addition in the spaces, although it was done by the assent of *E.*; yet, that was an action on the case brought by *C.* against *D.*, in the nature of deceit, for destroying the effect of the bond. And Mr. Justice *Popham* there said, that, "if it had been appointed by the obligor before the sealing and delivery thereof, that it should be afterwards filled up, it might then, peradventure, have been good enough, and should not have made the deed to be void; but that, being after, it avoided the deed." That case is also reported in *Moore* (a), where it is said that afterwards the plaintiff brought a new action on the bond, against the obligor, who pleaded the special matter, and concluded, that, therefore it was not his deed; to which the plaintiff replied, that the blanks were filled up with the assent of *A.*, and *B.* the obligor; to which the latter demurred: and that it was adjudged for the plaintiff. That decision is recognized in *Zouch v. Clay* (b), where in debt upon an obligation, *A.* and *B.* delivered the bond to *C.*, and, after, by the consent of the parties, the name and addition of *D.* was interlined, and he also sealed the obligation and delivered it. And, if the obligation, by this alteration, was made void against *A.* and *B.* or not, was the question. But Lord Chief Justice *Hale*, and the whole Court, adjudged, that it was not; and that it was the obligation of all three, and so was *Moore's Rep.* pl. 738, although 3 *Cro.* 626, was before adjudged to the contrary. But, as the case is in 3 *Cro.*, the obligation was altered only by consent of the obligors, in the absence of the obligee, and without his notice, though to his use. But here, it is by consent of all parties.—So, in this case, the blanks were left by the consent of all the parties present at the time of

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(a) Page 547.

(b) 2 Lev. 35; S. C. 1 Vent. 185.

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the execution of the deed; and, as it was afterwards filled up in the presence of the defendant, and with his assent, he must be bound by it. In *Paget v. Paget* (a), a deed of revocation, and a new settlement made by that deed, though after the sealing and execution thereof *blanks were filled up*, and *not read* again to the party, *nor re-sealed* and executed, was yet held to be a good deed. In *Hall v. Chandless* (b), after C., D., and E., had executed a lease, and, previously to execution by A. or B., the lease was altered with the consent and privity of C. only, by an erasure, which excluded a certain portion of land inserted by mistake, but in which D. and E. had no interest, and A. and B. then executed the lease; it was held, that it was a valid deed, notwithstanding the alteration; and in *Doc d. Lewis v. Bingham* (c), where, by deed, a mortgagee conveyed to the mortgagor the legal estate, upon being paid the mortgage-money, and the latter re-conveyed it to trustees for the purpose of securing an annuity; and, at the time of the execution by the mortgagee, there were several blanks left in the deed, for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed, after the execution by the mortgagee: it was held, that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees, for the payment of the annuity. And Mr. Justice Bayley said (d): "The whole deed may be considered as one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of opinion, that any

(a) 2 Chan. Rep. 410; S. C. Vin. Abr. tit. "*Faits*," U.

(b) 4 Bing. 123.

(c) 4 Barn. & Ald. 672.

(d) Id. 675.

alteration made in the progress of such a transaction still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood." Here, the deed was not perfect till the blanks were filled up, and when that was done, the defendant was placed in a better situation, as the debt alleged to be due from him to *Mills* was reduced by his own shewing, and inserted by his assent and in his presence, according to the original intent of all parties, expressed on the previous day, when the deeds were executed. In *Texira v. Evans* (a), where the defendant wanting to borrow a certain sum, or so much of it as his credit should be able to raise, executed a bond with blanks for the name and sum, and sent an agent to raise money on the bond: the plaintiff lent half the sum required upon it, and the agent accordingly filled up the blanks with that sum and the plaintiff's name, and delivered the bond to him; on *non est factum* pleaded, Lord *Mansfield* held it to be a good deed. In *Matson v. Booth* (b), it was held, that the addition of an obligor to a bail-bond after the bond had been executed by several others, but before the Sheriff had accepted it, such addition being made *with the assent* of the Sheriff and the prior obligors, it did not vacate the bond or make a new stamp necessary; and Mr. Justice *Bayley* said (c): "The bond was never out of the hands of the obligor; it remained with his agent, and never passed to the obligee. All was *in fieri*, and the bond was in the nature of an *escrow* only. The addition of the name was made with the concurrence of the agent of the obligors, at a time when the bond could be considered no otherwise than as in the nature of an *escrow*; and, being made with the concurrence of the agent of the obligors, it is the same as if it had been with their concurrence; which brings the case within the

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(a) 1 Anst. 229, n.

(b) 5 Mau. & Selw. 223.

(c) Id. 226.

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authority of *Zouch v. Clay*." So, here, the deed was in the nature of an *escrow*, until the amount of the sum to be paid by the defendant to *Mills* had been ascertained and inserted, and the instrument was not complete until then; and as *Browne* acted as the agent of all parties, he was authorized to fill up the blanks; and, when that was done, the deed was to be delivered over to the party entitled to it; and a deed may be delivered as an *escrow*, without the precise form of words, or mode of delivery, as is laid down in *Sheppard's Touchstone* (a). Here, therefore, the trust deed is good, as against the defendant, without any actual re-execution or re-delivery; for, his assent to the insertion of the sum was tantamount to a re-delivery, or, at all events, as he afterwards confirmed the deed, he must now be bound by it; for, in *Coke v. Brummell* (b), where *A.*, as surety for *B.*, executed a joint bond and warrant of attorney to secure an annuity to *C.*; and, after the execution by *A.* and *B.*, it was discovered that part of *A.*'s christian name had been omitted in the body of those instruments, and he re-executed them after such name had been inserted, without the knowledge of *B.*: in an action brought against *A.*, in the Court of *King's Bench*, on the bond, he pleaded a judgment recovered against him and *B.*: this Court afterwards refused to set aside a joint judgment entered up on the warrant of attorney, on the application of *A.*, as that instrument was not defeated by the insertion of his christian name, and as he had recognized the validity of the judgment in the action brought against him on the bond. And Lord Chief Justice *Gibbs* said (c): "In an action on the bond brought against *A.* (the surety) in the Court of *King's Bench*, he pleaded a judgment recovered against himself and his principal, thereby not only recognizing the validity of the judgment, but, by making use of it, defeating that action; and after that he makes this application,

(a) Page 58, 59.

(b) 2 B. Moore, 495.

(c) *Id.* 499.

whereby he seeks to set it aside; this the Court are of opinion they cannot do—*first*, because the nature of the securities was not defeated by the insertion of part of the christian name, to which alteration the surety himself was a party—and *secondly*, because he afterwards recognized the judgment as being legally entered up, and availed himself of it in the action brought against him in the Court of *King's Bench*." But it is clear that a re-execution or re-delivery is not necessary where the first delivery requires confirmation; and, if there be an imperfect delivery at first, or something further is necessary to be done, a second delivery or confirmation will supply the defect, and the Court will not hold the first to be complete so as to defeat the second. In *Perkins* (a) it is said: "It is to be known that a deed cannot have and take effect at every delivery as a deed; for, if the first delivery take effect, the second delivery is void." That, however, must apply to a case where the deed was *complete* at the time of the first delivery: but, if it be not, a second delivery, on its completion, may be considered as a confirmation of the first. In *Butler and Baker's* case (b), Lord Coke refers to that of *Jenings v. Bragge* (c), where a special verdict found that a dis-
 seisee made an indenture purporting to be a lease for years, and delivered it to a stranger off the land, as an *escrow*, and commanded him to enter on the land, and to deliver it on the land, as his deed, to the lessee, which he did accordingly; and it was adjudged that it was a good lease. In that case too it was resolved, that, to some intent, the second delivery has relation to the first delivery, and to some not, and yet, in truth, the second delivery hath all its force by the first delivery; and the second is but an execution and consummation of the first; and, therefore, in case of necessity, &c., *ut res magis valeat quam pereat*, it shall have relation, by fiction, to be his

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(a) Page 154.

(b) 3 Rep. 35, b.

(c) Trin. 37 Eliz.

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deed *ab initio*, by force of the first delivery." And, as Lord *Mansfield* said, in *Goodright v. Straphan*, delivery is an act *in p^{re}sent* only, and a deed is not to be re-executed or re-attested, but a second delivery is good and effectual, and circumstances alone may be equivalent to such re-delivery; and here, a re-delivery must be inferred, as the defendant not only assented to the insertion of the sum in the blanks left in the deed for that purpose, but afterwards recognized it by various acts, *viz.* by being present when the deeds were executed by his wife, and also by joining her in a fine to enure to the uses of the trust deed. When, therefore, the sum due from the defendant to *Mills* was ascertained and inserted in that deed, the instrument was completed according to the original intention of the parties; and the previous execution, which was conditional only, was then made absolute.

With respect to the objection as to the stamp, the case of *Coates v. Perry* (a) is decisive to shew that a common deed stamp was sufficient. There, parties by deed conveyed all their effects to trustees, in trust to sell, and, with the proceeds to be derived from the sale, to discharge—first, debts due to the trustees, then debts to other creditors; with a resulting trust, as to the residue, to the parties conveying; and it was held, that such deed did not require an *ad valorem* stamp, as upon a conveyance or mortgage, under the statute 55 Geo. 3, c. 184, as the clause as to a conveyance operated only as to actual sales between the vendor and purchaser; and that it fell within the exception as to a mortgage, where a conveyance is made for the benefit of creditors generally.

Lastly. Browne was properly admitted as a witness, as he had no interest to support the deeds, nor could the present verdict be used in evidence either for or against him; and a mere equitable interest as a trustee did not render him in-

(a) 6 B. Moore, 188; S. C. 3 Brod. & Bing. 48.

competent to prove the circumstances under which the deeds in question were prepared and executed by the parties.

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Mr. Serjeant *Wilde*, in support of his rule.—Although it may be said that this is an issue directed for the purpose of satisfying the conscience of the Court, still it must be regulated by legal principles, and decided according to the established rules of evidence. The learned Judge ought not to have left it in terms to the Jury, whether there were any circumstances from which a re-delivery or re-execution of the trust-deed by the defendant might have been inferred. The case of *Doe d. Carter v. Straphan* is inapplicable, as, there, the deed delivered by the wife during her coverture was absolutely void; but, here, the trust deed was perfect on the day it was first executed by *Mills* and the defendant, in the presence of the attesting witness, who did not attend on the following day, when the blanks were filled up by *Browne*. The situation of the defendant must be looked at. He was confined in the *King's Bench* Prison, at the instance of the plaintiff and *Mills*. By the deeds, all the defendant's property was conveyed from him, and there was no attorney or professional adviser present to act on his behalf. These facts afford strong evidence of fraud, and, as it must be supposed that the defendant was most anxious to obtain his liberty, the circumstances under which the deeds were obtained are, at all events, pregnant with suspicion. All the parties to the deeds were adverse to the defendant's interest, and all his estates were conveyed to the plaintiff in trust, to satisfy the enormous demands of *Mills* and the other creditors. Blanks were left in the deed of trust for the insertion of a debt, said to amount to 16,000*l.*, but which was to be ascertained thereafter. If the attesting witness had died, and the sum had been inserted afterwards, that fact could not have been ascertained. If, therefore, a re-execution or re-delivery can be presumed,

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after so material an alteration in the deed of trust, it would be productive of the most dangerous consequences, particularly, as such a circumstance could only be proved by parol. In case of the death of the defendant, which might have happened immediately after the deed was executed, and before the interlineations could be made, his estate would have passed to the plaintiff for the purpose of fulfilling the trusts mentioned in the deed; and *Mills* had then a lien on the property, to the extent of the debt actually due to him, the amount of which alone remained to be ascertained. As, therefore, the deed was signed, sealed, and delivered by the defendant on the 28th *November*, and was perfect in as far as it conveyed the defendant's estate in trust for his creditors, the subsequent re-execution or re-delivery could have no effect, and the deed was void by the interlineation or insertion of the sum in question. Lord *Mansfield*, in *Goodright v. Straphan*, referred to *Perkins*, which he observed was a very good authority in point of law, and who said, that, if the first delivery of a deed take effect, the second delivery is void. Although it has been urged that the deed might operate as an *escrow* until the blanks were filled up, as it might be considered *in fieri*, according to what fell from Mr. Justice *Bayley*, in *Matson v. Booth*, yet, that case cannot apply, as the mere addition of a co-obligor to a bail-bond did not vacate it. The bail, as sureties, were jointly and severally bound, and each became responsible when he executed the bond; but, here, the deed was complete in all its parts when it was executed, with the exception of introducing a certain sum to be ascertained thereafter. But the deed in question was not in the nature of an *escrow*, nor was it in *Browne's* custody as such. In *Cruise's Digest* (a) it is said: "That, in the delivery of a deed as an *escrow*, two things must be attended to—*first*, that the

(a) 3d Edit. Vol. 4, p. 32.

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form of the words used in the delivery be apt and proper, and that this mode of delivery ought to be taken notice of in the attestation; and *secondly*, that the delivery be to a stranger; and *Sheppard's Touchstone* (a) is referred to, where the same doctrine is laid down. In *Comyns's Digest* (b), it is said: that delivery is essential to a deed; for it is not a deed without delivery, though it be sealed. And that, if a man deliver a writing to *A.*, to the use of *B.*, it is not a delivery to *B.* if it was not delivered as his deed. Here, however, the deeds were always in the possession of *Browne*, who was the agent of the plaintiff as trustee, and of the other creditors of the defendant; and, therefore, he cannot be deemed a stranger, and the deed must be considered as absolute and binding on the defendant from the moment of its execution by him. If he had then assented to the amount of the debt claimed by *Mills*, no subsequent re-delivery or re-execution could have been required; and, although blanks were left for the insertion of the sum due to *Mills*, he acquired an interest under the deed at the time of its execution. But, if a re-execution were to operate, when was it to take effect? from the first, or the second day? Presumptions can only be raised in the absence of express evidence; and here, no re-execution or re-delivery was or could in fact be proved, nor was there any circumstance from which a re-delivery could be inferred. Even if there were a re-execution or re-delivery, the deed ought to have had a new stamp, as the insertions made in it rendered the former deed altogether void. It is an undisputed principle, that an alteration of a deed in any material part, either by addition, interlineation, or erasure, will vitiate or avoid the deed, even though a blank might be filled up by the assent of the parties after it has been executed, on the ground, that it is not the same contract which the parties

(a) 58.

(b) Tit. "*Faits*," A. 3, 4.

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sealed and delivered. The only question, then, is, whether the filling up the blanks in the trust deed did not so far vary it as to render it altogether void as against the defendant, who was sought to be bound by it. By the introduction of the sum due from him to *Mills*, not only the contract but the rights of all the parties were materially altered. The case of *Doe d. Lewis v. Bingham*, is distinguishable; as, there, the interest of the mortgagee was not affected by the alterations, and they were perfectly immaterial as to him. There, too, the deed was only in progress; whilst, here, it was perfect at the time of its first execution; and the defendant, on *non est factum*, might shew that it was not the same deed, either in terms or in effect, as when he executed it. There can be no doubt but the deed had its legal operation with respect to the plaintiff as trustee, and all the other creditors of the defendant, with the exception of *Mills*, from the moment of its execution; and no assent was shewn by either of them, that the blanks should be filled up by the insertion of the sum in question. It is an established principle, that, where several deeds are to enure for one purpose, the whole must be taken as one entire transaction, and to operate as one assurance; for, in *Cromwel's* case (a), it was decided, that, if there be a bargain and sale, and recovery and fine, although they be made, suffered, and levied, at several times, yet all of them, by the agreement and assent of the parties, make but one and the same assurance, according to one and the same original bargain and contract; and here, the deed of trust was executed for the purpose of corroborating the conveyance to the plaintiff by lease and release; and the trust deed was to be executed immediately after the execution of those deeds. If, therefore, the one be void, the others must fall also. With respect to the case of *Coke v. Brummell*, the application was made to the equitable jurisdiction of the

(a) 2 Rep. 75.

Court, and the warrant of attorney, which was at least an instrument of an equivocal nature, had been in part acted upon before the application was made. In *Paget v. Paget*, it does not appear what was the nature of the blanks, nor can any legal principle be deduced from that case. Here, however, the question is, whether the legal interest of all the parties remained the same, for if there be any material alteration in a particular part of the contract, the deeds are rendered nugatory and void. Before the amount of the sum due to *Mills* was inserted, the defendant's property was conveyed to the plaintiff, in trust, for the payment of the defendant's creditors generally; and the amount of their respective claims might have been disputed. But by the insertion of a certain sum in the trust deed as being due to *Mills*, the defendant was bound to pay it whether it were due or not, and by which the rights or interests of the other creditors might, at all events, be prejudiced. The deeds of lease and release conveyed the legal estate, with an absolute power of sale. They must, therefore, be considered in the nature of a mortgage security, or a conveyance; in either of which cases they should have been stamped with an *ad valorem* stamp: and, as the deed of trust is void, it must be considered as if it had never existed, and, consequently, the deeds of lease and release do not fall within the exception in the 55 Geo. 3, c. 184, as a conveyance made for the benefit of creditors generally, or of certain specified creditors who shall accept the provision made for the payment of their debts, in full satisfaction thereof; or who shall exceed five in number.

At all events, *Browne* was not a competent witness, either to prove the circumstances under which the trust deed was executed, or the blanks filled up; and as he was the only party present, with the exception of *Mills* and the defendant, he ought not to have been allowed to explain, by parol, the nature of that transaction; particularly as he had an interest in supporting the deeds, as he was not on-

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ly to be paid the expenses for preparing them, but had acted under the deed of trust, to which he himself was a party, and under which he rested his defence in an action of trespass commenced against him by the present defendant, for entering on part of the property which was the subject matter of that deed.

Lord Chief Justice BEST.—This was an issue directed by the Court, for the purpose of ascertaining, whether certain deeds were the deeds of the defendant, and, if so, whether they had been properly executed, or were obtained by fraud or covin. The Jury have found that all the deeds were properly executed, and they have negatived fraud. An application has been since made to us to grant a new trial, on several grounds. *First*, that the testimony of a witness (*Browne*) was admitted, which ought not to have been received. *Secondly*, that the deeds of lease and release should have had an *ad valorem* stamp, as they were in the nature of a mortgage security, or a conveyance for sale—so it would be, perhaps, if we looked at those deeds only; but the object of all the deeds was, to convey the defendant's property to be sold for the benefit of his creditors. And *Lastly*, that the trust deed was a completely executed deed at the time the witness attested its execution in the *King's Bench* Prison; and that the learned Judge ought not to have left it to the Jury to presume another execution or re-delivery; that, if it were a perfectly executed deed, the filling up the blanks subsequently to its execution, though with the assent of all the parties, rendered the deed a nullity; and that, if the trust deed be void, the two previous deeds are useless, and may be considered as gone, because they refer to the latter, and cannot stand as a complete conveyance of the defendant's property, without it. I am disposed to agree with my brother *Wilde*, though it is not necessary to decide that point, that, if the trust deed is void, the other deeds must fall. But I am of opinion, that

all the deeds may stand: and that will dispose of the objection raised to the stamp; because, it is admitted, that, if the trust deed is to be incorporated, so as to form part of one and the same assurance, it shews that it was the intent of the parties to convey for the benefit of more than five creditors; and, if so, it comes within the exception of the stamp act. As to the admissibility of the witness *Browne*, I do not think it necessary to decide that he could not, in a Court of law, be considered as a competent witness, when the learned Judge (Mr. Justice *Holroyd*), for whose opinion I entertain the highest respect, thought it right to receive him. But, supposing he was not, ought we in this case, who directed the issue for the purpose of ascertaining facts to satisfy our minds, when we see that justice has been done, whether that witness spoke the truth or not, ought we to send this cause down again? It is not like the trial of a suit, where a party has a right, if a person deposes to facts that are material, and he turns out not to be a competent witness, to call on the Court and say that he is entitled to have that verdict set aside, as it was founded on evidence which ought not to have been received. But that is not our situation with respect to this cause, because it is the creature of our discretion, and we are therefore now to decide, whether, under all the circumstances, it would be fit to send it down again. Now, when one recollects that the witness *Chapman* proved all that was necessary to be proved to sustain this verdict; and that his testimony is uncontradicted, (I allude to the conversation he spoke of with the defendant, when he acknowledged that he had executed the deeds, and that the sum due to *Mills* was engrafted into the deed of trust); and when we find that the defendant, after this, wrote letters to the different tenants, and, in those letters, acknowledged the execution of the deeds; can we say it is fit in such a case, merely because some evidence was received which ought not to have been received, to send this question

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down for the consideration of another Jury? I think not. This brings me to the material questions in the case, which have been divided into two. It has been first insisted, by the counsel for the plaintiff, that there was no perfect execution of the deed of trust, until the sum of 14,858*l.* 8*s.* 8*d.* was inserted in it; and, if there was not a perfect execution of the deed up to that time, it was competent to the Judge who tried the cause, to leave it to the Jury to consider whether they would not presume a re-delivery of the deed, after all the sums were written in, and it was rendered a perfect deed. I am of opinion, that this is a correct view of the case; and, if it be, it comes precisely within the principle of the case of *Doe d. Carter v. Straphan*, to which my brother *Holroyd* referred at the trial. There, a deed had been executed by a married woman, and, as such, was undoubtedly a void instrument. But, after the death of her husband, when she was in a state to dispose of her property, she, by various acts, confirmed the deed: and the Court of *King's Bench* decided, that, by the confirmation of the deed, the Jury were warranted in presuming a re-execution of it. Undoubtedly, in that case, Lord *Mansfield* referred to a passage in *Perkins*, where he says: "It is to be known, that a deed cannot have and take effect at every delivery, as a deed; for, if the first delivery take effect, the second delivery is void; as, in case an infant, or a man in prison, makes a deed and delivers the same as his deed, &c.; and, afterwards, the infant, when he cometh to his full age, or the man in prison, when he is at large, delivers the same again as his deed, which he delivered before as his deed, this second delivery is void." Now, that brings me to the question, was there any *perfect delivery* of the deed of trust, antecedent to the time when the amount of the sum due to *Mills* was written in? If we look at the deed, it is quite impossible to say that it could have any operation, till the whole of the sums were actually written in; for, what was the object

of the deed? The object of all the deeds was, to convey the defendant's estates to a trustee, that they might be sold, and that the proceeds might be applied to pay the debts of certain creditors, which were to be ascertained, and when ascertained were to be inserted in the deed of trust. In preparing the draft of that deed, blanks were left for the insertion of the sums, until the debts of the respective creditors should have been ascertained. When the parties first met in the *King's Bench* Prison, on the 28th November, can it be said that there was a perfect execution of the deeds, when the amount of the sum due to one of the principal creditors remained unascertained? The operative part of the deed of trust refers to the payment of particular sums, which, at first, were not ascertained. It is quite clear, if nothing had passed on the day the deeds were executed, that the trust deed could not be an operative deed, until all the sums were introduced, because the main object of that deed was the payment of those sums. I therefore think, that, taking it in this point of view, this was not to be considered as an execution of the deed—that it was not a complete deed; and, therefore, the case falls within the authority of that in *Couper*, and not within the law which was there referred to from *Perkins*. This deed of trust, as I have stated, undoubtedly was not to be considered as complete until the sum due to *Mills* was introduced. But, it has been said, that it could not be delivered as an *escrow*, unless it were so delivered in terms. Perhaps, technically speaking, this is so; because a deed delivered to the party is not an *escrow*. A deed delivered to a stranger is an *escrow*, till something is done; but, though it is delivered to a party, there are cases to shew that it may not be a perfect and complete deed. In *Comyns's Digest* (a), that learned writer, in treating of the delivery of deeds, says: "If a writing be once delivered as the deed of the obligor,

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it is sufficient, though he afterwards by words explains his intent otherwise; as, if an obligation be made to *A.* and delivered to *A.* himself as an *escrow*, to be his deed upon performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant." When we come to look at the authorities which are referred to in the text, in support of that proposition, there is some difficulty to ascertain on which side the balance lies, as several cases are referred to, which are in themselves conflicting and contradictory. But, in the next division (*a*), it appears to me to be clear that the formal delivery as an *escrow*, as applicable to this case, is merely a technical subtlety, if I may be allowed such an expression; for Lord Chief Baron *Comyns* says: "If a writing be delivered to a stranger as an *escrow*, to be the deed of the party upon performance of conditions, it is not his deed till the conditions performed, though the party happens to have it before, or it be delivered to a stranger to keep till conditions be performed, or *to be delivered to the party, as his deed, upon performance of a condition;*" and this latter position that learned writer gives as his own authority, without referring to any case; and I think I am warranted in saying that we cannot have a better authority.

Let us now see how that doctrine applies to the present case. The parties met—something was to be done before a complete deed could be made—the sums were to be ascertained which the different creditors were to be paid. That was not done on the first day of meeting; but they all were ascertained on the following day, when they were written in. Taking it, then, that the first was a delivery, was it not a delivery of the deed, in the language of Lord *Coke*, upon condition, *vis.* upon condition that something was to be done which at that time was not done; and, when that something is afterwards done,

(*a*) Tit. "*Fait*," (A. 4.)

then, and not until then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have been decided upon the alteration of deeds, we may say that this deed was not a complete deed executed, so as to have effect in the hands of the parties, until all the sums were inserted or written in. I certainly shall not, after what I have said, travel through the different cases that have been cited, with respect to the alteration of deeds; but I beg not to be taken as deciding, that, if a deed be altered, *with the consent of all the parties, after it is executed*, it may not be considered as a good deed. I think, if we were driven to examine that question, it would be found that, in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered shape, be a good deed; but I do not decide this case on that ground. I decide it on this, that it either was no deed at all, until the sum due to *Mills* was written in, and that then the Jury were warranted in presuming a re-delivery to make it a deed; or that, if it were a deed, it was delivered, in the first instance, only to have operation from the time that that sum was written in, which was to give it its full effect. I therefore think we must take it, from what passed at the time of the execution, that it was not to be considered as having effect, till it could have its full force by all the sums being written in which were to be written in.

On these grounds, I am of opinion that the rule should be discharged. My brother *Burrough*, who heard nearly the whole of the argument, but who was obliged to go to Chambers before its conclusion, desired me to state that he concurs in this opinion.

Mr. Justice GASELEE (a).—This case has been extremely well argued, and a great number of authorities have

(a) Mr. Justice *Park* was absent, on account of indisposition.

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been referred to, which it is now unnecessary to ravel through at length; but that which appeared to me to be the strongest, and which at first struck me as being most against the opinion which my Lord Chief Justice has now given, was the passage cited from *Buller's Nisi Prius*, viz. that, "if there be blanks left in an obligation, in places material, and filled up afterwards *by the assent* of the parties, yet is the obligation void; for it is not the same contract that was sealed and delivered." That certainly is borne out by the authority referred to in *Rolle's Abridgment*; but Mr. Justice *Buller* goes on by saying: "As, if a bond be made to C., with a blank left for his christian name, and for his addition, which is afterwards filled up." Now, I should certainly have supposed that the leaving the blank for the christian name and the addition, imported of itself that it was to be afterwards filled up. But I think that that position is not warranted by the authority to which that learned writer refers; and certainly this case does not range itself within the first part of the sentence, because it appears to me that, from what was done here, the deed or contract was not *materially altered*. What was the meaning of the deed? Its object was the payment of all debts which the defendant owed to *Mills*, and certain other creditors. That which was uncertain when the deed was at first executed, or rather when it was originally signed and attested, was afterwards reduced to a certainty. Then, the way in which I consider the trust deed to be good, is this, that it was an imperfect execution when the parties first met, with an agreement that it should be afterwards perfected and take effect, when all the blanks were filled up. Now, it appears that there was afterwards a meeting for that purpose; that the sum due to *Mills* was at that time agreed on; and that it was filled up in the hand-writing of *Browne*, who was adopted and acted as the agent of all parties: and, after the deed was filled up by him, he took

it away, for the purpose of carrying it to other creditors of the defendant, by whom it was also to be executed. But it has been said, that the defendant *Revett* never had the possession of this deed himself. Although that may be so, yet a deed may be delivered, either by actual delivery, or by words, or acts equivalent to a delivery; and here, the permitting *Browne* to take the deed away, and carry it to other parties, for the purpose of their executing it, was of itself a question fit to be left to the Jury, whether that was not (if a re-delivery should be deemed to be necessary) a re-delivery on the completion of the deed, by the insertion of the amount of all the sums due from the defendant to his creditors. On that ground it is, that I am of opinion that the trust-deed is to be considered as good.

With respect to the admissibility of *Browne* as a witness, I own I should have great difficulty in saying that he could be a witness, if the objection to his testimony were raised in an ordinary case of a trial at *Nisi Prius*. He was a party to the deed of trust, and had, at the time of the trial, incurred certain expenses, which were to be paid according to the terms of that deed. But, considering this in the point of view in which my Lord Chief Justice has taken it, and in which I have known issues directed by the Court of *Chancery* treated, where the object was to satisfy the conscience of the Court, *viz.* that if we see, upon the whole, that justice has been done, there can be no occasion to send the case down to a new trial. Has then, justice been done in this case? and does it really depend on the single testimony of *Browne*? The first question then is, what is the probability of the case? To which the answer is, that the final completion and delivery of the deed was left for future consideration. There were a number of blanks left in it when it was carried to the defendant on the first day, to be executed, in the *King's Bench* Prison; all those blanks were then filled up, with the exception of

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the amount of the sum due to *Mills*. The probability, then, is, that *Mills's* debt was not at that time ascertained, and that was confirmed by *Browne*, who stated, that it was done on the following day. But it does not rest on his testimony alone, for the witness *Chapman* said, that he saw the defendant afterwards with a draft of a deed before him; that he, the defendant, was then reading it, and told the witness that he had executed it, and that he had got time, and had reduced the debt alleged to be due to *Mills* from 16,000*l.* to between 14,000*l.* and 15,000*l.*, for which sum blanks, which had been left, were filled up. Therefore, the evidence of *Chapman* shews that what was done on the second day, when the blanks were filled up by *Browne*, was done with the defendant's assent. But it does not rest here; a great number of documents were referred to at the trial, many of which were put in; and by the first of which, it appears, that the defendant was not only cognizant of all that he had done, but had expressly acted upon and confirmed the deed in question; for, on the day the blanks were filled up, he stated, in a letter to *Moss*, one of his tenants, as follows:—
“ Having this day executed to Mr. *Thomas Hudson* (the plaintiff) a conveyance of all my estate and hereditaments, in trust, for the purpose of satisfying various charges and incumbrances on the above property, I write to desire that you will in future pay your rents to the said *Thomas Hudson*, or his appointed receiver, whose receipt will be a sufficient discharge.” That letter was read at the trial, and not only shews the confirmation of the contract, but that the defendant was aware of what he had done; besides which, a paper containing the amount of the rental, and the names of all the tenants, was produced, which was delivered by the defendant to the plaintiff; and in which, among other names, that of *Moss* was mentioned. But I rely mainly on the letter written by the defendant to *Moss*, and which I think is sufficient to satisfy the Court

that the Jury have, upon this occasion, done justice between the parties. This rule, therefore, must be—

Discharged (a).

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(a) The defendant *Revett* having distrained on *Moss* for rent alleged to be due to the former, the latter brought an action of replevin, which the Court directed to abide the event of this issue;

and they now ordered a verdict to be entered for *Moss*, on his pleas in bar of *non tenuit* and *riens in arrear*; and he was also to be allowed the costs of the action.

Sir WILLIAM DE CRESPIGNY, Bart. v. The Honourable
W. L. WELLESLEY.

Monday,
Feb. 9th.

THIS was an action for a libel, sent by the defendant, in a letter, to be published in a weekly newspaper called *The Sunday Times*. The declaration contained fourteen counts, and after the usual inducement as to the plaintiff's being a person of good name, fame, and credit, the ninth count stated, that the defendant, contriving and intending to traduce, vilify, and defame the plaintiff, and to bring him into public scandal and disgrace with and amongst the subjects of this realm, heretofore, to wit, on the 15th July, 1828, at &c., *falsely and maliciously* published, and caused and procured to be published, a certain false, scandalous, malicious, and defamatory libel, of and concerning the plaintiff; in which libel there were and are contained (amongst other things), the false, scandalous, malicious, defamatory, and libellous words and matter following, of and concerning the plaintiff. [Here, a memorandum, containing certain extracts from parts of a letter from the Rev. *Heaton C. De Crespigny*, to the defendant, dated on the 8th *July* preceding, were set out, with the defendant's answers to such extracts; and then the following minutes of conversations which the defendant stated

In an action for the publication of a libel reflecting on the character of an individual, the defendant cannot justify the publication, by pleading that the libellous matter was communicated to him by a third person, whose name he disclosed at the time of the publication of the libel; and it seems doubtful whether such would be a sufficient defence in an action for oral slander.

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that he had had with the Rev. *H. C. De Crespigny*, and which were shewn to Captain *De Brooke*, in the presence of Colonel *Freemantle*, Mr. *Saville Lumley*, M.P., and Colonel *Paterson*, on *Monday*, the 16th *June*, 1828]. The copy of the minutes referred to, was dated the 5th *December*, 1827, and was set out in the count as follows—

“ Copy of minutes referred to, dated 5th *December*, 1827.

“ Mr. *De Crespigny* told Mr. *Wellesley* he was wrong in supposing he had spoken to his father, Sir *William De Crespigny*, (meaning the plaintiff). He had written a letter to him, and he had his (meaning the plaintiff's) answer, in which he (meaning the plaintiff) admitted the fact; and that his wife, Mrs. *De Crespigny*, and himself, had the letter; that all the family knew of the *circumstance*, [intimacy] (*a*); that his poor brother *William* (who is dead) was extremely jealous of his father (meaning the plaintiff), and had been turned out of his house; *that his mother had told him that a child had been born, and that it had been her conclusion (b), [my mother was dead]*, that his brother *Herbert* had spoken to his father (meaning to the plaintiff), upon the subject, who replied, that he (meaning the plaintiff) entreated, that so distressing a subject might not be again mentioned to him (meaning to the plaintiff). The Rev. Mr. *De Crespigny* told Mr. *Wellesley*, he thought he was quite right not to allow his children to remain with people so infamously connected.”

Then came a copy of a communication, stated to have been made by the Rev. *H. C. De Crespigny* to the Honourable *W. L. Wellesley*, upon his return from the Miss *Longs*, dated the 7th *December*, 1827, as follows—

(*a*) The word *intimacy* was substituted, by the defendant, for *circumstance*.

(*b*) The words in italics had been

erased by Mr. *De Crespigny*, and [my mother was dead], inserted in lieu thereof.

“ Mr. *De Crespigny* informed Mr. *Wellesley* he had seen the Miss *Longs* yesterday, at their house in *Berkshire*, and that he had directly accused Miss *Emma Long* with her intrigue, upon which she got so confused, that she left the room in the greatest embarrassment; that he then stated to Miss *Dora Long*, that Miss *Emma Long* had intrigued with his father (meaning with the plaintiff), and that Mr. *Wellesley* intended to publish the whole story, unless they immediately gave up his children. Miss *Long* replied, she had nothing to do with her sister's intrigue, and she must be responsible for her own conduct; but that no one would believe what Mr. *Wellesley* said. Mr. *De Crespigny* assured Mr. *Wellesley* that she never denied her sister's having committed the fault. Mr. *De Crespigny* told her his father (meaning the plaintiff) had *confessed it* [not denied it], to which she made no reply, *but put herself into a violent passion*, and said she did not wish to see any of Mr. *Wellesley's* friends within her house. Notwithstanding such declaration, she invited Mr. *De Crespigny* to dine with them, and to sleep at *Binfield House*.

“ The above minutes were shewn to Captain *De Brooke*; and, on the part of the Rev. *H. C. De Crespigny*, he admitted them *twice* to be correct, with the exception of one word, *viz.* that, for ‘ *confessed it*,’ the words, ‘ *not denied it*,’ ought to be substituted.”

The eleventh count set out the copy of the communication (as above), made by Mr. *De Crespigny*, to the defendant, upon his return from the Miss *Longs*, dated the 7th *December*, 1827. The twelfth count charged the defendant with publishing the libel in the *Age* newspaper, as set out in the ninth count, with additional extracts from, and answers to, Mr. *De Crespigny's* letter of the 8th *July*; and the thirteenth and fourteenth counts set out parts of the libel only.

The defendant pleaded—*first*—Not Guilty to the whole declaration.

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Secondly, as to the publishing, and causing and procuring to be published, the following parts of the said supposed libel of and concerning the plaintiff, in the ninth count of the declaration mentioned, with the intent and meaning therein mentioned, to wit, ‘*Mr. De Crespigny told Mr. Wellesley he was wrong, in supposing he had spoken to his father, Sir William De Crespigny (meaning the plaintiff), &c.*, [here the whole of the libel was set out as in the ninth count]:—the defendant said, that the plaintiff ought not to have and maintain his aforesaid action thereof against him, because, he said, that, before the publishing of the parts of the said supposed libel in the ninth count of the declaration mentioned, to wit, on the 5th *December, 1827*, ‘*the said Rev. H. C. De Crespigny told the defendant that he was wrong, in supposing that he, the said H. C. De Crespigny, had spoken to his father, Sir William De Crespigny, (meaning the plaintiff), &c.* [here the libel was again repeated, to the words “to remain with people so infamously connected,” with the omission of the word *circumstance*, and also of the passage that *his mother had told him that a child had been born, and it had been her conclusion, [my mother was dead]*.” And the defendant further said, that the said *H. C. De Crespigny*, afterwards, and before the publishing the said libel in the introductory part of the plea mentioned, to wit, on the 7th *December, 1827*, *further told the defendant*, that he had seen the Misses *Long* yesterday, at their house in *Berkshire*, &c. [here that part of the libel was repeated, to the words “to sleep at *Binfield House*,” with the omission of the words “*confessed it*,” and “*put herself into a violent passion*.”] And the defendant further said, that, before the publishing of the said parts of the said supposed libel in the introductory part of this plea mentioned, to wit, on the 16th *June, 1828*, certain minutes and statements in writing were made, as and for correct minutes and statements of the said communications and representations so made by the said *H. C. De Crespigny*, as aforesaid; and the same were then

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revised and corrected by the said *H. C. De Crespigny*; and, when so revised and corrected, contained, and still do contain, the words and matter following, with the interlineations and alterations as follows—"Mr. *De Crespigny* (meaning the said Rev. *H. C. De Crespigny*) told Mr. *Wellesley* (meaning the defendant) he was wrong, in supposing, &c. [here the libel was again set out, as in the minutes, with the alterations or interlineations by the defendant, and the erasures by Mr. *De Crespigny*, the word *circumstance* having been altered to *intimacy*; "*that his mother had told him that a child had been born*," being erased; and the words, "*not denied it*," substituted for "*confessed it*;" and "*put herself into a violent passion*," being also erased]. And the defendant further said, that, afterwards, and before the publishing of the said parts of the said supposed libel in the said ninth count mentioned, to wit, on the said 16th *June*, 1828, the said *H. C. De Crespigny* caused the said minutes and statements, so revised and corrected by him as aforesaid, and containing the words and matter last aforesaid, to be delivered to him, the defendant, as and for a true and correct statement of the conversations he, the said *H. C. De Crespigny*, had had with the defendant as aforesaid; and the said minutes were heretofore, to wit, on &c. aforesaid, shewn to the said Captain *De Brooke*, in the presence of the said Colonel *Freemantle*, Mr. *Saville Lumley*, and Colonel *Pater-son*. And the defendant further said, that, at the time of publishing the said several parts of the said supposed libel in the said ninth count, and in the introductory part of this plea mentioned, as therein mentioned, he, the defendant, *also published, that the same had been so published to him* by the said *H. C. De Crespigny*, therein mentioned, as aforesaid; *wherefore, he, the defendant, at the said several times when, &c., in the said ninth count mentioned, did publish of and concerning the plaintiff the said several parts of the said supposed libel in that*

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count mentioned, as he lawfully might, for the cause aforesaid; and this, &c., wherefore, &c.

The defendant, in his third plea, alleged, that, before the publishing of the parts of the libel in the introductory part of the second plea, and in the ninth count mentioned, the said *H. C. De Crespigny* did publish, and cause and procure to be delivered to the defendant, certain minutes and statements in writing, as revised and corrected by him, containing the libel in question, and published to the defendant the said minutes and statements, with the like meaning, and in the same sense, as in the ninth count alleged.

And *lastly*, as to the composing and publishing so much of the said supposed libel in the declaration mentioned, as imputed to the plaintiff, that he had intrigued with Miss *Emma Long*, and that he had not denied it; and also, as to the composing and publishing the words and figures following, in the said ninth, eleventh, twelfth, thirteenth, and fourteenth counts of the declaration mentioned, and therein supposed to have been composed and published by the defendant of and concerning the plaintiff, [here the minutes were again in part set out]; the defendant said, that the said *H. C. De Crespigny* composed and published the said matters in writing to the defendant, of and concerning the plaintiff, with the like intent and meaning as in those counts mentioned; and that the defendant, at the time of composing and publishing, &c., as in the introductory part of that plea mentioned, *did also publish that the same had been so composed and published* by the said *H. C. De Crespigny*.

The plaintiff added a *similiter* to the first plea, and demurred specially to the second, assigning for causes, that the defendant had not, in or by that plea, stated or alleged, that such parts, as in the introductory part of that plea are mentioned, of the libel therein also mentioned, were true, or that any of them was true, or that the plaintiff had been or was guilty of the offence or miscon-

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duct by the last-mentioned parts of the said libel charged against and imputed to him; and, also, for that the defendant, as a justification for the publication of the said last-mentioned parts of the said libel, had, in and by his said second plea, stated and alleged, that the said *H. C. De Crespigny* told him, the defendant, and assured him of, such matters and things as in the said second plea are in that behalf respectively stated and alleged; and that the said minutes and statements in that plea mentioned, were made as therein is mentioned; and that the same were revised and corrected by the said *H. C. De Crespigny*, and by him caused to be delivered to the defendant, as in the said second plea is mentioned; and that the said minutes had been shewn to such persons as in that plea are in that behalf mentioned; and that the defendant, at the time of publishing the said last-mentioned parts of the said libel, had also published that the same had been so published to him by the said *H. C. De Crespigny*, as in the said second plea is in that behalf mentioned;—whereas, such statements and allegations of the defendant as last aforesaid, if true and correct in fact, are not, nor is any of them, any justification or excuse for the publication of the said last-mentioned parts of the said libel by the defendant, or any answer to this action, in respect of such publication;—and also, for that, the defendant hath, in and by the said second plea, attempted to justify the publication of the said last-mentioned parts of the libel; upon the ground, and because, that the said *H. C. De Crespigny* had told the defendant, and assured him of such matters and things as in the said second plea are in that behalf respectively stated and alleged; and that the said *H. C. De Crespigny* had caused to be delivered to the defendant, such minutes and statements as in the said second plea are in that behalf mentioned; and that the defendant, at the time of publishing the said last-mentioned parts of the said libel, had also published,

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that the same had been so published to him by the said *H. C. De Crespigny*, as in the said second plea is in that behalf mentioned; whereas, the previous publication of the said last-mentioned parts of the said libel, by the said *H. C. De Crespigny*, to the defendant, whether in speaking or in writing, was not, nor is, any justification for the publication thereof by the defendant; and also, for that, the said second plea does not state, or set forth, any justification or excuse for the publication by the defendant of the said last-mentioned parts of the said libel.

There was a special demurrer to the third plea, similar in terms to the second:—and to the last, the plaintiff assigned for cause, among several others, that it did not therein appear, nor was it sufficiently stated, to which one particular libel, or part thereof, of the several libels in the declaration mentioned, the following words, to wit, “so much of the said supposed libel in the declaration mentioned, as imputed to the plaintiff, that he had intrigued with Miss *Emma Long*, and that he had not denied it,” in the introductory part of that plea, refer, or are meant or intended to refer; inasmuch, as there are several separate and distinct libels mentioned in the declaration, to any of which such words might refer.

The case came on for argument on a former day in this Term.

Mr. Serjeant *Wilde*, in support of the demurrer.—Neither of the pleas can be supported in point of law. They would even be bad on general demurrer. The question raised by them is, whether an individual who re-publishes *written slander, which he has received from another*, may justify such publication, by disclosing, at the time, the name of the person who first made the communication to him. Although, in some instances, it is true, that a person repeating slander which he has *heard* from another, may be justified, if, at the time of the repetition, he names

the person from whom he heard it, yet that rule has never been extended to the case of written slander, which is a more deliberate act, and by which greater publicity is given. The basis of the pleas is founded on a resolution in the Earl of *Northampton's* case (a). That, however, was an information by the *Attorney-General*, against several defendants, in the *Star Chamber*, one of whom was charged with having spoken and published certain scandalous words of the Earl of *Northampton*, a grandee and peer of the realm, That, therefore, was a species of slander of which the law takes especial notice, which is termed *scandalum magnatum*, and is provided for by the statutes 3 *Edw.* 1, c. 34, 2 *Rich.* 2, stat. 1, c. 5, and 12 *Rich.* 2, c. 11, by which a party telling or publishing false news of any great men of the realm, was liable to imprisonment, until he had brought into Court the first author of the tale. And, although, by the fourth resolution in that case, it is said to have been resolved, "that, in a private action for slander of a common person, if *J. S.* publish that he hath heard *J. N.* say, that *J. G.* was a traitor or thief, in an action on the case, if the truth be such, he may justify;" yet that resolution was extra-judicial and uncalled for, and was inconsistent with the decision in that case, as all the defendants were found guilty, notwithstanding they alleged that they had heard the report from others.

The twelfth part of *Lord Coke's Reports* was only a posthumous publication, and printed on the mere authority of *Bulstrode*, who stated, by way of preface, that he had perused, and did, upon his reading thereof, conceive the same to be the collections of *Lord Coke*; and Mr. Justice *Holroyd*, in adverting to *Lord Northampton's* case, in *Lewis v. Walter* (b), said, that the book in which that case was found, was not so accurate as the rest of the Reports of *Lord Coke*, not having been

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published by him in his life-time, but from his notes afterwards; and Mr. *Hargrave*, in his *State Trials*, says (a), that the twelfth part of Lord *Coke's Reports*, was merely a collection of cases by him, which were not intended for publication; and Mr. Serjeant *Hill*, in a note in his copy of those Reports, states, that the twelfth part was not fit to be allowed; and he referred to the case of the prerogative or dispensing power of the King (b), by which the opinions there introduced might justify the King in acting against law, and afforded grounds for him to erect arbitrary power. Although, however, some cases may be found, in which the resolution in Lord *Northampton's* case has been treated as an authority, yet there is no decision to establish it, to its full extent, or any *dictum* to be found, where a defendant has been entitled to the benefit of it, in a plea of justification to words spoken or written; and as it is repugnant to principle, it ought not now to be considered as law. In *Crawford v. Middleton* (c), the plaintiff having declared for slanderous words, charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested, by the opinion of three Judges, for want of an averment, that, in truth, nobody had said such words to the defendant; against the opinion of Mr. Justice *Twysden*, who thought that the words being laid to be spoken falsely and maliciously, and so found by the verdict, was a proof that nobody had said so to him. But that case cannot be supported, as the opinion of the three Judges went upon the ground, that the defendant might have justified the slanderous words upon the report of another, *without naming him at the time*, which was contrary to the rule laid down in Lord *Northampton's* case. In *Lewis v. Walter* (d), an action was brought for these words, namely: *J. P.* did say, that

(a) Vol. 11, p. 30.

(b) 12 Rep. 18, 19.

(c) 1 Lev. 82.

(d) Cro. Jac. 406, 413.

J. L., (meaning the plaintiff), did say, that there is no prince in *England*; *ubi revera*, *J. P.* never spake any such words: on motion in arrest of judgment, that the words were not actionable, because they were but the report of the speech of another; yet the Court held, that, as the plaintiff alleged that *J. P.* never spake them, the action might be maintained. In *Gardiner v. Atwater* (a), the words spoken were: "Thou art a sheep-stealing rogue, and farmer *P.* told me so." On motion in arrest of judgment, Lord Chief Justice *Denison* said: "It has been said, that although the words might be actionable, yet that the plaintiff ought not to have judgment, because it was not averred that farmer *P.* did not tell the defendant so; but the Court were of opinion that that averment was by no means necessary, it being quite immaterial whether farmer *P.* did or did not tell the defendant so." In *Woolnoth v. Meadows* (b), where one said of another, that his character was infamous, and imputed to him unnatural practices; it was held, that such words could not be justified by any plea, naming, for the first time, the person from whom the defendant heard the complaint. That case, therefore, in effect overruled that of *Crawford v. Middleton*: and although the authority of the rule in Lord *Northampton's* case was recognized and confirmed by Lord *Kenyon*, in *Davis v. Lewis* (c), and by Lord *Ellenborough* in *Woolnoth v. Meadows*, namely, that, in order to enable a defendant to justify slanderous words upon hearsay, or the report of another, he must disclose, at the time of uttering the slander, the name of the person from whom he heard it; the object of which was to give the plaintiff his action in the first instance against the original author of the slander; yet, in *Maitland v. Goldney* (d), Lord *Ellenborough* considered that one who repeated slander, after knowing it to be unfounded, could not justify it, by hav-

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(a) *Sayer*, 265. (b) 5 *East*, 463. (c) 7 *Term Rep.* 19. (d) 2 *East*, 426.

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ing named his author at the time: and the rule there laid down is, that, in order to justify the repetition of slanderous words spoken by another, the defendant must give a certain cause of action against that other, by naming the author of the slander, and giving the very words which he used:—and Lord *Ellenborough* there said, that, without considering the extent of the rule laid down in Lord *Northampton's* case, it was sufficient to observe of it, that it was a case of *oral*, whilst *Maitland v. Goldney* was one of *written* slander. Mr. Justice *Lawrence* also forbore to comment on Lord *Northampton's* case, as it did not apply to *written* slander. In the late case of *Lewis v. Walter (a)*, to a declaration for a libel published in a newspaper, the defendant pleaded that the libel was originally published in another paper by *J. S.*; and that, at the time of the publication by the defendant, it was stated, in such publication, that it was copied from that paper; and it was held, that the plea was bad, inasmuch as the publication by the defendant did not specify by name *J. S.* as the original publisher of the libel, but only named the paper from which it was copied. It also seems from that case, that even if *J. S.* had been named by the defendant when the latter published the libel, such publication, being of *written* slander, could not have been justified; for Lord Chief Justice *Abbott* said: “I am not prepared to assent to the proposition, that such a defence is applicable to cases of written slander, for that would give great facility to such publications, which ought, if possible, to be prevented. And Mr. Justice *Holroyd* said: “In actions for slander, the truth may be pleaded as a legal defence. But that plea admits the malice, and, notwithstanding that, justifies the publication. It is, however, a very different thing to justify the repetition of slander, by alleging, as a bar, that

(a) 4 Barn. & Ald. 605.

some other person originally was the author of it. For it does not follow, that, because a defendant may justify slander, if true, he may also justify the repetition of slanderous words which are not true, if he has heard them from another person;" and he concluded by saying, "Perhaps, the rule has been laid down too largely in the Earl of *Northampton's* case, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander." And Mr. Justice *Best* said: "The attempt is to justify this libel under the authority of the Earl of *Northampton's* case. If this precise point had been there determined, I should doubt the propriety of that decision: and I think that the reasons given by my brother *Holroyd*, shew that the fourth resolution in that case requires some qualification; for it cannot be justifiable to repeat slander under all circumstances, but only in those cases, where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause. And, besides, I am not prepared to say that that case extends to written slander, in which the repetition, by producing a greater dispersion, increases in a tenfold degree the injury to the individual."—Although, therefore, the resolution in Lord *Northampton's* case may apply to a case of oral slander, yet it cannot be extended to libel, or written slander. In *M'Gregor v. Thwaites* (a), Lord Chief Justice *Abbott* said: "It is to be observed, that Lord *Northampton's* case was a case of oral slander, and that *M'Gregor v. Thwaites* was a case of slander reduced into writing or print by the act of the defendants. It is thereby rendered more injurious, and part of it is thereby become actionable, which before was not so. There may, therefore, be a material distinction in this respect between merely repeating slander and publishing it in writing or print." And Mr. Justice *Bayley* said: "There is a great

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distinction between oral and written slander." The true ground for that distinction is, that, in case of written slander, the publication may be extended to all parts of the world, whilst oral slander is generally confined to a few, and the imputation cast upon the party is more readily forgotten. The late case of *Flint v. Pike* (a) tends to shew that the subsequent publication of slanderous matter cannot be justified, unless it be shewn that it was published for the purpose of giving the public information, which it was fit and proper for them to receive, and that it was incumbent on the party to shew that the publication was warranted.

[Lord Chief Justice *Best*.—If *A. B.* says a thing to *C. D.* jocosely, he would not be justified in reporting it, as if *A. B.* had told it to him seriously.]

Here, the plaintiff has alleged in his declaration, that the defendant published the libel falsely and *maliciously*; and that the plaintiff thereby received an injury. Neither of the pleas contains an answer to the charge of *malice*, nor does the defendant attempt to justify that what he published was true, or that he believed it. At all events, the conversations which took place between him and Mr. *De Crespigny*, must be considered in the nature of a confidential communication; and the mere delivery of the minutes to the defendant would not justify their publication. Besides, the pleas are bad in substance, because they do not give the plaintiff a right of action against the Reverend Mr. *De Crespigny*, the alleged author of the slander. The defendant does not allege that he was the first author, and the whole of the statement made by him was contained in the minutes or communication, which were reduced into writing by the defendant himself. Besides, Mr. *De Crespigny*, on the minutes being shewn him, erased that part which stated that "*his mother had told him that a child had been born,*" and alleged that "*she was*

(a) 4 Barn. & Cress. 473.

dead;" and yet the defendant published it, and attempted to justify it in his plea. He therefore published every thing which could tend to injure the plaintiff, although a most material fact was expressly disavowed by Mr. *De Crespigny* himself. Lord *Coke* admits, in Lord *Northampton's* case, that it is necessary to name the author, even in the case of oral slander, for he says: " If *J. S.* publish that he hath heard generally, *without a certain author*, that *J. G.* was a traitor or thief, there an action *sur le case* lieth against *J. S.* for this, that he hath not given to the party grieved any cause of action against any, but against himself who published the words, although that in truth he might hear them; for otherwise this might tend to a great slander of an innocent; for, if one who hath *læsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally, that he hath heard scandalous words, without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the reporter, than if the author himself should be mentioned; for the reputation and good name of every good man is dear and precious to him." At all events, that case applies only to oral slander, and its principle has never yet been extended to the publication of a libel or written calumny.

The third plea cannot be supported, as it merely states that Mr. *De Crespigny* caused certain minutes and statements in writing to be delivered to the defendant as revised and corrected by him. That, therefore, is a mere argumentative statement, and is not sufficient to fix Mr. *De Crespigny* as the first author or publisher of the minutes in question. Neither is it averred, that the minutes were delivered as a true statement, nor were they so in point of fact, as Mr. *De Crespigny* had erased a material part of them, which the defendant published notwithstanding.

The last plea is bad at all events, as it only professes

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to justify a certain part of the libel as set forth in the declaration. Besides, it is pleaded to several counts, and it is impossible to ascertain to which of these counts the plea was intended to refer.

Mr. Serjeant *Spaskie, contra.*—The defendant's pleas are *prima facie* an answer to the charges contained in the plaintiff's declaration; and if the publication of the alleged libel were made by the defendant *malâ fide*, the plaintiff should either have replied that fact specially, or proved it at the trial, which he might have done under the replication of *de injuriâ*. An action for slander or libel is founded on malice and falsehood, and it is sufficient for a defendant to negative either the one or the other in his pleas. It is a complete answer to a charge of malice, that the defendant is not the author of the alleged slander or libel, but that he heard or received it from another, whom he names in his plea, and that the publication is a mere repetition of facts or circumstances of which such person had informed him. Here, it cannot be assumed that the mere repetition of the statement made by Mr. *De Crespigny* to the defendant is malicious; and, consequently, he was not bound to negative malice in his plea. The resolution in Lord *Northampton's* case has been since recognised and adopted as an authority, as generally as any other case to be found in the Reports of that learned writer. But the true principle does not rest on that case alone, which appears to have been decided in the tenth of *James* the First. In *Lewis v. Walter*, which was decided four years afterwards, and which is better reported in *Rolle* (a) than in *Croke*, the case of *Dame Morrison v. Cade* was referred to, which is also reported in *Croke* (b), and appears to have been decided in the fourth of *James* the First, which was an action against the defendant for having said, that *A.* had reported that he had had connection with the plain-

(a) 1 Rolle's Rep. 444.

(b) Cro. Jac. 162.

tiff; *ubi revera* he, *A.*, never made any such report: and the Court held, that the plaintiff was entitled to judgment, because, the report of the speech of another, who never used such words, was actionable. So, in *Rolle's Abridgment* (a) it is said: "That if a man says, that *Pierce* said, that *Lewis* did a certain scandalous thing, *Lewis* shall have an action for this against him, with an averment, that *Pieroe* never said so; for then he himself is the author of the false news, and shall be charged for it: and the case of *Lewis v. Walter* is referred to. But that, if a man says, that *J. S.* said, that *J. D.* said a certain scandalous thing; that will bear an action of itself, though this be false; yet, if *J. S.* said, that *J. D. said the words*, no action lies against him, for he has *named his author, scilicet, J. S.*; and, therefore, he must bring his action against *J. S.*, if he will have remedy: and a *dictum* of Mr. Justice *Tanfield*, in *Dame Morrison and Cade's* case, is referred to in support of that distinction. If, therefore, a person, repeating slander, names his author at the time, he is excused, and the remedy of the party who supposes himself to be injured thereby, is against the original utterer or propagator of the report. In *Crawford v. Middleton*, the name of the party who told the defendant that he should take the plaintiff to gaol, was not mentioned, but merely that the defendant said, that *he met one upon the road* who said so. In *Gardiner v. Atwater*, the objection was taken after verdict, and the Court held the words spoken by the defendant to be actionable, independently of the averment, that the defendant had been told so by another. But, the Earl of *Northampton's* case was expressly confirmed by Lord *Kenyon* in *Davis v. Lewis*, where his Lordship said (b), that, "if a person say that such a particular man (naming

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(a) Vol. 1, p. 64, tit. "Action sur Case (X) Pur. Parols."

(b) 7 Term Rep. 19.

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him), told him certain slander, and that man did in fact tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but, if he assert the slander generally, without adding who told it to him, it is actionable." That is the sound and true distinction. In *Maitland v. Goldney*, the defendant published the slander, with a knowledge that the person who had originally uttered it, was satisfied that it was untrue: and the rule laid down in Lord *Northampton's* case was not attempted to be impeached. If the defendant in this case had received the report from a person who had *læsam phantasiam*, or who was a drunkard, or person of no estimation, the plaintiff should have replied that fact; but, as he has not done so, and the defendant has given the name of the person from whom he received the communication, it is sufficient to repel the charge of malice. In Lord *Cromwell's* case, it was resolved (a), that, in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking them; and here the defendant has alleged, that, before the publishing of the libel, the minutes complained of were not only delivered to the defendant by Mr. *De Crespigny*, but revised and corrected by him. The defendant, therefore, was justified in publishing them, on naming Mr. *De Crespigny* as the author of the statements therein contained; and there is, consequently, no material distinction to be drawn in this case between written and oral slander, as the delivery of the minutes to the defendant was tantamount to a publication. In *Baldwin v. Elphinstone* (b), it was held, that there were various modes of publication of a libel, and that the delivery of a letter containing a libel *primâ facie* amounts to a publishing. In *Lewis v. Walter*, the plea was held to be bad, inasmuch as the publication by the defendant did not specify the original publisher of the

(a) 4 Rep. 13 b.

(b) 2 Sir Wm. Bl. 1037.

libel by name; whilst, here, he was not only named but designated. The defendant need not have alleged in his pleas, that he believed the communication to have been true; for he had no reason to attach discredit to any thing which came from Mr. *De Crespigny*. Although it has been said, that there is a distinction between written and oral slander, yet, Sir *James Mansfield*, in *Thorley v. Lord Kerry*, said (a): "I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action." And here, the plaintiff has a right of action against Mr. *Heaton De Crespigny*, his name appearing as the original utterer of the report, on the face of the record. Although it has been said, that the last plea is objectionable, as it is not stated with sufficient precision to which part of the libel the plea refers, yet, in *Stiles v. Nokes*, Mr. Justice *Le Blanc* said (b): "A plea of justification may be good with a general reference to certain parts of the libel set forth in the declaration, if the Court can see with certainty what parts are referred to; as, if the reference be to so much of the libel as imputes to the plaintiff such a crime (*e. g.* perjury), that would be sufficient, without repeating all those parts again, which would lead to prolixity of pleading, and ought to be avoided."

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Mr. Serjeant *Wilde*, in reply.—Admitting that the Earl of *Northampton's* case was not the first in which the principle as to the republication of slander was established; yet, those decisions, as well as the fourth resolution in that case, proceeded on the statutes of *Edward* the 1st and *Richard* the 2nd, which were passed for the suppression of false news and the slander of great men of the realm. It is evident that the cases of *Lewis v. Walter*, and

(a) 4 Taunt. 364.

(b) 7 East, 507.

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Dame Morrison v. Cade, were decided on those statutes, as in *Rolle's Abridgment* it is said: "*car ceo est solonque la ley de newes.*" So, in *Viner's Abridgment*, which is a literal translation, it is said (a): "for this is according to the law of news." In *Dame Morrison v. Cade*, the words were spoken of the plaintiff, and the Earl of Kent, who was one of the great men of the realm; and, therefore, the propagator of the report was liable to punishment, unless he named the person from whom he received it. But that cannot apply to a case of private slander, and much less to the re-publication of libellous matter. Although it has been said, that, in order to maintain an action for slander, the words spoken or written must be false as well as malicious; and that it is sufficient for the defendant to negative either falsehood or malice in his plea; yet, here, the defendant has done neither, nor has he ventured to allege that the report furnished to him by Mr. *De Crespigny*, was a true report, or that he believed it to be so: and the mere delivery of it to him forms no excuse for its publication. Although Sir *James Mansfield*, in *Thorley v. Lord Kerry*, said, that he could not make any difference between words spoken and words written, as to the right of bringing an action upon them; yet, the distinction has long since been laid down, as the one is sudden and fleeting, whilst the other is permanent, more deliberate, and more widely disseminated. Although it has been said, that, if the defendant received the report from a beggar or a drunkard, the plaintiff ought to have replied it; yet, here, as it was not the fact, he was not bound to do so; neither did the defendant allege, that Mr. *De Crespigny* alone was the original propagator of the report, or that he published it in such a manner as to give the plaintiff a right of action against him. At all events, it was in-

(a) Tit. "Actions for Words," (X a).

cumbent on the defendant to justify all the charges alleged against him in the declaration; and, as he has failed to do so, the plaintiff is entitled to judgment.

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Cur. adv. vult.

Lord Chief Justice BEST, after stating the ninth count of the declaration, the pleas, and the demurrers, now delivered the judgment of the Court as follows:—

Great industry has been bestowed on this case by my learned brothers, by whom it was argued; but no case has been cited, in which the principle, extra-judicially applied by the fourth resolution in Lord *Northampton's* case to oral slander, has been extended to libels. We might relieve ourselves from the difficulty of deciding this question, by saying, that the technical objections taken to the pleas by the demurrers are sufficient to entitle the plaintiff to judgment. But we think it more proper to pronounce our judgment on the principal question raised by the pleadings—namely, whether a man, who receives from the hands of another a libel on any person, is justified in publishing that libel, provided that, in his publication, the name of the person from whom he received it is mentioned? We do not hesitate to say, that, even if we were to admit (what we beg not to be considered as admitting), that, in oral slander, when a man, at the time of his speaking the words, names the person who told him what he relates, he may plead, to an action brought against him, that the person whom he names did tell him what he related. At all events, such a justification cannot be pleaded to an action for the republication of a libel. If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the public or daily journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition

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of oral slander. In the latter case, what has been said is known only to a few persons, and, if the statement be untrue, the imputation cast upon the individual may be got rid of; the report is not heard of beyond the circle in which all the parties are known; and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be circulated or spread over the world by means of the public press, the malignant falsehoods of the vilest of mankind, (which would not receive the least credit when the authors are known) would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, completely, to remove. The reason which Lord *Coke* gives, why, in the case of oral slander, the author should be named, proves that a party must not be allowed to publish written calumny. He says, that, unless the name of the author be mentioned, it might be a great slander of an innocent person; for, if one, who has *læsam phantasiam*, or is a drunkard, or of no estimation, speaks scandalous words, if it should be lawful for a man of credit to report generally, that he had heard scandalous words, without mentioning his author, that would give greater colour and probability that the words were true, in respect of the credit of the reporter, than if the author were mentioned; for the reputation of every good man is dear and precious to him." Of what use is it to send the name of the author with a libel that is to pass into countries where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity, or not; whether his statement was made in earnest, or by way of jest; whether it contains a charge made by a man of sound mind, or was the delusion of a lunatic. There is no allegation, in this case, that the defendant *believed this statement*; on the contrary, it is to be observed, that Mr. *De Crespigny* struck

out a very material part of the statement, and yet the defendant published it, although he must have known that it was not correct. I allude to that part in which the defendant makes Mr. *De Crespigny* say, "that his mother had told him that a child had been born." Although he admits in his pleas, that Mr. *De Crespigny* had erased those words, yet he justifies the publishing of them. The declarations of a son and dying wife are made the means of blasting the reputation of a father and a husband. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that the pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the character of any persons whom they might be disposed to calumniate. There will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish those who will pay for them, with any statements they may desire, respecting the character of any person whatever. Written communications are often made for the information of those to whom they are given, and for their information only. Such communications contain facts necessary to be known by those to whom they are made, but not fit to be divulged to the whole world. It may be important to the interest of members of a family, to know things which have taken place in their family, and which have been disclosed with a due regard to the interest of the person to whom the disclosure is made. Such disclosure, although injurious to some other persons' characters, would not be libellous. Can it be permitted, that persons possessing such communications, should publish them to the world, if they will only give the names of those by whom they are made? Such a doctrine might furnish amusement to the lovers of scandal, but it would cause much misery in many families. It is a principle of our law, that, whoever wilfully assists in committing an unlawful act, becomes answerable for all the

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consequences of such act. What reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript, has to answer for by far the greater part of the mischief that the statement has occasioned. But it has been said at the bar, that the pleas are *prima facie* answers; and that the circumstances which are to shew that the publication was not honestly made, ought to come from the plaintiff in his replication, or to be proved under the general replication of *de injuria*. But the defendant ought to know the state of the author, and the circumstances under which he wrote the libel. The plaintiff may be ignorant of these circumstances; the law requires that facts should be proved by those who ought to have the means of knowing them, and not by those who must be presumed ignorant of them. But the pleas do not present a *prima facie* defence. They offer nothing that requires an answer. Because one man does an unlawful act to any person, another is not permitted to do a similar act to the same person:—wrong is not to be justified, or even excused, by wrong. If a man receive a letter with authority from the author to publish it, the person receiving it will not be justified, if it contain libellous matter, in inserting it in the newspapers. No authority from a third party will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. This seems to be a case of the latter description; but, if published, either with or without the authority of the writer, it can never be a justification, nor can the previous publication be set up in mitigation of damages, without proof that *the author believed it to be true*, and had some reasonable cause for publishing it. We are not to endure a reproach against our neighbour; what then is our moral duty, if we hear any thing injurious to the character of another? If what we have been told does not

concern the public, or the administration of justice, we are to lock it up for ever in our own breasts:—we are on no account to report it to indulge our enmity to any particular person, or, for that more common course of slander, to gratify the malice that exists, by a desire to raise ourselves above, or keep ourselves upon an equality with our neighbours, by injuring their characters. The statements published relative to the plaintiff do not concern the public; they are not disclosed in the course of the administration of justice; nor does it appear from the pleadings, that the defendant, in making this virulent attack on the plaintiff, had the excuse that he published this paper in his own defence. But, before he used this statement in any manner, he was bound to satisfy himself that it was true, and he does not even say *that he believed it*. Before he gave it general notoriety, by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property, without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, as compared with that caused by loss of property, we must feel that the amount of the former injury far exceeds that of the latter. We are warranted in saying that the defendant has made a very serious charge against the character of the plaintiff, without being prepared to establish it; for, if he could have proved that what he has published is true, he might have put the truth of the statement on the record, as his justification. There must consequently be

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Judgment for the plaintiff.

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The 92nd section of the statute 6 Geo. 4, c. 16, is prospective, and only applies to commissions to be issued after the passing of that act, as it binds the bankrupt if he does not give notice to dispute the commission within two months after the adjudication.

The deposition of a petitioning creditor, that the bankrupt was indebted to him upon, and by virtue of, certain bills of exchange, at and before the date and suing forth of the commission, which bills appeared, by a schedule underwritten, to have been drawn and indorsed by the bankrupt, is not sufficient, as it should have been shewn that the bills were indorsed to the petitioning creditor before the act of bankruptcy.

KEY and Another, Assignees of SHERWIN, a Bankrupt,
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THIS was an action for use and occupation, and brought by the plaintiffs, as assignees of *Sherwin*, a bankrupt, to recover from the defendant the sum of 250*l.*, for five years' rent of land and premises, alleged to have come to the possession of the bankrupt since his bankruptcy.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, it appeared, that the defendant had occupied the lands for which the rent was claimed for several years, and that they had been devised to the bankrupt by his uncle; that the commission issued against the bankrupt on the 2nd *March*, 1822; that the assignees afterwards gave the defendant notice of the bankruptcy, and ordered him not to pay rent to the bankrupt: notwithstanding which, he did so, from *Lady-day*, 1823, to *Lady-day*, 1828; on which the present action was commenced. Previously to the trial, the defendant gave the plaintiffs notice of his intention to dispute the petitioning creditor's debt, trading, &c., and the validity of the commission; and, on the proceedings being produced, they appeared to have been enrolled on the 1st *March*, 1828; and, as the witness who deposed to the act of bankruptcy was dead, and the plaintiffs did not adduce sufficient evidence to prove his death, it was submitted that his deposition could not be received; as the statute, 5 Geo. 2, c. 30, by the 41st section of which the deposition might have been admissible, had been repealed by the statute 6 Geo. 4, c. 16. On which it was insisted for the plaintiffs, that the deposition was receivable under the 92nd section of the latter act (*a*):—to which it was answered for the

(*a*) By which it is enacted, "that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), with-

in two calendar months after the adjudication; or (if he was out of the United Kingdom), within twelve calendar months after the

defendant, that that statute only applied to commissions that had been sued out since the act came into operation. But, the Lord Chief Justice being of opinion that the 92nd clause was retrospective, allowed the deposition and other proceedings under the commission to be read.

The deposition of the plaintiff, *Key*, the petitioning creditor, sworn before the commissioners, in proof of his debt, was as follows, *viz.* “That *Sherwin* (the bankrupt) *was, at and before the date and suing forth of the commission*, and still is, justly and truly indebted to the deponent and his partners in the sum of 145*l.* 18*s.* 11*d.*, upon and by virtue of the four under-mentioned bills of exchange; the full amount of the two first of which bills the deponent and his partners gave to *Sherwin*, the bankrupt, in money, deducting legal discount; and the full amount of the two last of which bills, the deponent and his partners gave, on and previous to the 16th day of *May*, 1821, to *Sherwin*, in goods sold and delivered to him: and for which said sum of 145*l.* 18*s.* 11*d.*, the deponent had not, nor had his partners, received any security or satisfaction whatsoever, save and except the said bills of exchange under-mentioned and set forth.

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Date.	Drawer.	Acceptor.	Sum.	Payable to	At what date drawn.	Indorsers.
16 April, 1821.	Sherwin.	Lewis.	30 0 0	Order.	12 months.	Sherwin.
Do.	Do.	Plummer.	42 0 0	Do.	Do.	Do.
16 May, 1821.	Key.	Sherwin.	36 18 11	Do.	8 months.	Do.
Do.	Do.	Do.	37 0 0	Do.	9 months.	Do.

adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt, and of the trading and act or acts of bank-

ruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit.”

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It was then objected for the defendant, that, as the two bills drawn by the bankrupt, and which formed part of the petitioning creditor's debt, were not due until the 19th April, 1822, which was more than a month after the date of the commission; and it was not shewn or stated when they were indorsed by him to the plaintiff, as petitioning creditor; or that he was the holder at the time of the act of bankruptcy; the deposition was defective upon the face of it, as it ought, at all events, to have stated, that the bills *were indorsed* to the plaintiff and his partners before the commission was sued out, according to the case of *Ross v. Rowcroft (a)*. His Lordship, however, thought that it was reasonable to conclude, that the bills were in the possession of the petitioning creditor before the commission was issued; and that it might also be inferred, that they were discounted by the plaintiffs for *Sherwin* before he had committed an act of bankruptcy.

The Jury found a verdict for the plaintiffs, leave being reserved to the defendant to move to set it aside, and that a nonsuit might be entered, or a new trial granted, in case the Court should be of opinion that the proceedings before the commissioners ought not to have been received in evidence, or that the deposition of the plaintiff *Key* was not sufficient proof of the petitioning creditor's debt.

Mr. Serjeant *Wilde*, on a former day in this Term, accordingly obtained a rule *nisi*—against which

Mr. Serjeant *Taddy* now shewed cause—*First*, whether the depositions taken before the commissioners were admissible in evidence or not, will depend on the construction of the statute, 6 Geo. 4, c. 16, which, in its general enactments, is applicable to all questions of evidence that arise after it has taken effect, whether the commission issued before or

(a) 4 Camp. 245.

after the act was passed ; and where a different rule is to be adopted with regard to commissions issued after the act, it is in terms so expressed, as in the 96th section, by which it is enacted, “ that in all commissions issued *after the act shall have taken effect*, no commission, adjudication, assignment, or certificate, shall be received as evidence in any Court of law, unless the same shall have been first entered of record. But the words in the 92nd section have all a retrospective view, *viz.* that if the bankrupt *shall not have given* notice of his intention to dispute the commission, and *have proceeded* therein with due diligence within two months if he *was* within, or twelve if he *was* out of the United Kingdom, Both these sections have reference to the 135th, by which it is enacted, that the act shall be construed beneficially for creditors ; and that is the general purview of the whole of the statute. The question then is, as the bankrupt gave no notice of his intention to dispute the commission within two months after the adjudication, he being within the kingdom at the time it was issued, whether the words of the 92nd section are confined to commissions which should issue after the act should have taken effect, or comprised commissions which were subsisting at the time it came into operation ; or, in other terms, whether the 92nd clause is retrospective or merely prospective. In the 90th section, which requires notice to be given of an intention to dispute the petitioning creditor’s debt &c., the words used are “ In any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant &c.” These words clearly comprise commissions then subsisting, as well as commissions thereafter to be issued. So, the words in the 91st section, which have reference to suits in equity, refer to *all such suits* by or against the assignees ; and the 92nd expressly enacts, that the depositions taken before the commissioners shall be conclusive evidence of the mat-

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ters therein respectively contained in all actions at law, or suits in equity, brought by the assignees for any debt or demand, for which the bankrupt might have sustained any action or suit; and here it is quite clear, that the bankrupt might have sustained an action against the defendant for the rent sought to be recovered by the plaintiffs as his assignees, in the present suit; and there is nothing in the 92nd clause to restrict it to those actions which should be brought after the act was to come into operation. The 95th section is clearly retrospective, as it confirms all things done pursuant to the statute 5 Geo. 2, c. 30, s. 41, as far as it regards the enrolment of the proceedings; and as the present depositions were enrolled in pursuance of that statute, they were properly admitted in evidence at the trial. By the 135th section, it is expressly enacted, that nothing therein contained shall render invalid any commission then subsisting, or which should be subsisting at the time the act should take effect. As, therefore, the spirit of the act and manifest intention of the Legislature were, to establish peace between the bankrupt and his assignees, and the time has gone by, when the bankrupt himself could have disputed the commission, the defendant ought not now to be permitted to do so.

Secondly, as to whether the deposition by the plaintiff contains sufficient evidence of a good petitioning creditor's debt:—It purports upon the face of it, that the bankrupt had indorsed and parted with the two bills of exchange drawn by him; and that the plaintiff and his partners were the holders of them at the time of the bankruptcy, and before the suing out of the commission; if not, the deposition would be false, and the party making it might have been indicted for perjury. By the statute 7 Geo. 1, c. 31, the provisions of which are included in the 6 Geo. 4, c. 16, s. 51, bills of exchange are proveable under a commission by *bond fide* holders, whether they be due or not, deducting a rebate of interest; and the bills in question were clearly prove-

able, according to the case of *Macarty v. Barrow* (a), which has been since frequently recognised, and where the doctrine was established, that, if a bill be drawn before a trader becomes bankrupt, but not protested for non-acceptance until afterwards, it is, nevertheless, a debt proveable under the commission, on the ground, that it is *debitum in præ-senti, solvendum in futuro*. So, in *Starey v. Barnes* (b), where a bill of exchange was accepted, and not refused payment by the acceptor till after the bankruptcy of the drawer, it was determined that it might be proved under a commission against the latter. Although, in *Rose v. Rowcroft*, it was held, that the petitioning creditor's debt was not sufficiently established, as it was not shewn whether the bill of exchange, on which it was founded, was *indorsed* to him before the suing out of the commission; yet, it cannot be considered as an authority, as Lord Chief Justice *Gibbs* merely said: "I give no opinion on the point, whether it would have constituted a good petitioning creditor's debt, had it been proved to have been in his hands before the suing out of the commission." His Lordship, therefore, did not decide the point; and, in the late case of *Ex parte Douthat* (c), where the bankrupt drew a bill for value in favour of A., to whom he was previously indebted, and committed an act of bankruptcy before either the bill was due or had been presented for acceptance; the Court held that it was a sufficient petitioning creditor's debt, although it appeared, that, subsequently to the commission, the bill had been duly presented and paid by the acceptor:—and, although it was there insisted, that, until the bill had been dishonoured, the holder could not compel payment against the drawer; yet, Mr. Justice *Bayley* said (d): "The words of the statute are, 'all persons who shall give credit,' &c. Now, a man who takes a bill from the drawer is surely a person giving credit to him; and

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(a) 2 Str. 949; S. C. 3 Wils. 16.

(c) 4 Barn. & Ald. 67.

(b) 7 East, 435.

(d) Id. 71.

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the provision as to the rebate of interest, is also strong to shew that the Legislature contemplated a possible proof under the commission, and a payment of a dividend too, before the bill should become due." And here, as the plaintiff has sworn that the bankrupt was indebted to him and his partners on four bills of exchange, amounting to 145*l.* 18*s.* 11*d.* before the suing forth of the commission; it must be assumed, that they had been previously indorsed to them, or, at all events, that they were out of the hands of the bankrupt, as the drawer; and, if so, they were a debt proveable under the commission. And if they were indorsed between the time of the act of bankruptcy and the commission, it was incumbent on the defendant to have shewn it.

Mr. Serjeant *Andrews* and Mr. Serjeant *Bompas* (in the absence of Mr. Serjeant *Wilde*), in support of the rule.—The 92nd section of the statute 6 *Geo.* 4 can only be deemed to operate prospectively. The whole of the act must be looked at; and, by the 1st section, all the former statutes relating to bankrupts were expressly repealed. It must be presumed, that a statute is not to operate *ex post facto*, unless it be so declared, as it is contrary to justice and principle. Here, the commission was issued in 1822, and no proceedings were taken upon it by the assignees till 1828, and the rent in question was paid by the defendant to the bankrupt *bond fide*:—the deposition on which the petitioning creditor's debt was founded, was not only defective, but was not attempted to be put in force or proceeded on until nearly three years after the statute 6 *Geo.* 4 had passed. If the commission could be set up at such a distance of time, and the proceedings before the commissioners deemed conclusive, all *bond fide* payments to a bankrupt might be disputed. Previously to the passing of the act, all payments made to a bankrupt were valid, unless the commission issued against him was sought to be enforced by the assignees; and he might give notice of his intention to

dispute it at any time before plea pleaded, so as to shew the proceedings under it to be invalid; and the operation of the 6 Geo. 4 was postponed, in order to give parties an opportunity of regulating their rights according to the new law; but it was not meant to give validity to a bad commission previously existing. If the bankrupt had brought an action against his assignees for any thing done under the commission, for instance, trover for the seizure of goods, previously to the passing of the late act, the assignees could not have given the depositions in evidence under the 92nd section; and as the bankrupt might have disputed the commission at any time previously to the passing of that act, in case the assignees had proceeded against him, he had still a right to do so; and it would be too much to say that he should be deprived of that remedy, which he undoubtedly had before the act was passed. The proceedings under the commission should, at all events, have been enrolled and entered of record, as required by the 96th section; and the assignees ought not to have remained dormant for the period of six years from the time it was sued out. As, therefore, nearly all the clauses in the 6 Geo. 4, have a prospective view, and the Legislature contemplated commissions to be issued in future, the 92nd section, by which the time is limited to the bankrupt to dispute the commission, cannot apply so as to render previous commissions valid, but refers only to those which are sought to be impeached by the bankrupt after the passing of the act.

At all events, the deposition of the plaintiff is not sufficient to prove a good and subsisting petitioning creditor's debt, as it did not appear that he was the holder of the two bills drawn by the bankrupt, or that they were out of the hands of the latter at the time of the act of bankruptcy; and the holder could not maintain an action against the drawer, until the bills had become due and were dishonoured by the acceptor. It is quite clear, that, if the bankrupt held the bills at the time of the act of bankruptcy, and after-

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wards paid them to the plaintiff, a commission could not be supported upon them, as the debt must have accrued before the act of bankruptcy took place; and the case of *Rose v. Rowcroft* is decisive to shew, that a petitioning creditor must prove, that a bill of exchange was indorsed to him before he sued out the commission; because no debt is created against the drawer until he has parted with the bill: and the bills in question might not have been discounted until after the act of bankruptcy, or indorsed until the day before the commission was issued. In the late case of *Clarke v. Askew (a)*, where a deposition of a petitioning creditor only stated that a debt was due to him at and before the suing out of the commission, (as here), it was held to be insufficient, as it did not shew that the debt existed before or at the time of the act of bankruptcy. That case is precisely in point, and in conformity with an order of Lord *Loughborough*, made in *November*, 1798, by which he directed, that commissioners, before they declare a party to be a bankrupt, must cause a deposition of the petitioning creditor, stating the nature and amount of the debt due to him, and how and for what consideration the same arose, and also the particular *time or times the same accrued due*, to be entered upon the proceedings. The deposition in question, therefore, would not have been receivable under the 49th *Geo. 3*; and the 92nd section of the 6 *Geo. 4* only makes depositions conclusive evidence, if the bankrupt does not, within a certain period after the adjudication, give notice of his intention to dispute a commission issued under the authority of that act, and proceed therein with due diligence.

Lord Chief Justice BEST.—I certainly thought, at the trial, that the 92nd section of the statute 6 *Geo. 4*, c. 16, was retrospective; but I am now convinced that I formed an erroneous opinion, and that it only applies to commis-

(a) 1 Stark. Rep. 458.

sions to be issued under the authority, or after the passing, of that act. Although the words "if the bankrupt *shall not have* given notice of his intention to dispute the commission, and *have proceeded* therein with due diligence," seem to have a retrospective view; yet we must not scan them with grammatical accuracy, but look at the intention of the Legislature at the time the statute was passed. When the motion for the nonsuit was made, I thought that the clause could not have a retrospective operation, as it binds the bankrupt; and if he does not give notice, after the adjudication, within the times thereby prescribed, of his intention to dispute the commission, the proceedings under it are conclusive against him, and he is for ever after barred from raising any objection to them. Although it is said, that the bankrupt ought not to have lain by so long, yet, before the late act was passed, he knew that he might have disputed the commission at any time before plea pleaded. I am, therefore, of opinion that the first is a valid objection.

With respect to the second, although I never was a commissioner of bankrupts, yet I have long known the practice to have been, to take depositions in this form; and I have always been an enemy to overturn precedents founded on long established usage. The form of the deposition was immaterial before the passing of the statute 49 Geo. 3, as the commissioners might have made further inquiries; and, until then, the depositions, or other proceedings before the commissioners, were not admissible in evidence, to prove the petitioning creditor's debt, trading, and act of bankruptcy. But we have been referred to an order made by Lord *Loughborough*, in 1798, by which he directed commissioners to enter on their proceedings the deposition of the petitioning creditor, stating the nature and amount of the debt due to him, and for what consideration the same arose, and also the particular *time or times the same accrued due*. That, certainly, is a strong circumstance to shew that this deposition would

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be defective, even before the passing of the statute 49 Geo. 3. But the very point appears to have been taken before Mr. Justice *Bayley*, at the *Durham* Assizes, 1816, in the case of *Clarke v. Askew*, and which cannot be distinguished from the present, as, there, the deposition only stated that the bankrupt was indebted to the petitioning creditor at and before the date of the suing forth of the commission; and that learned Judge held, that it was not sufficient, as the deposition did not shew that the debt existed at the time the act of bankruptcy was committed. That cannot be considered as a mere *Nisi Prius* decision, as it afterwards came before the Court in *Banc*, who held the ruling of my brother *Bayley* to be correct. We, therefore, ought not to overturn or impeach that decision, but, on the contrary, to give it its full weight, if it be not inconsistent with law or the construction of the statute. By the bankrupt laws, in order to constitute a good petitioning creditor's debt, it must exist at the time of the act of bankruptcy on which the commission is to be grounded, and it must remain a debt as against the bankrupt from that time: and here it does not appear that the two bills of exchange drawn by the bankrupt, and which necessarily form part of the petitioning creditor's debt, were outstanding as against the bankrupt, or indorsed by him to the petitioning creditor, previously to or at the time of the act of bankruptcy. As the depositions taken before the commissioners are now made *conclusive evidence* of the facts therein contained, in order to sustain the petitioning creditor's debt, &c., the deposition in support of it should shew sufficient evidence of the existence of the debt upon the face of it. But, here, the deposition raises no legal conclusion that the debt had accrued at the time of the act of bankruptcy, but only that it was due at and before the date of suing out the commission; and, for any thing that appears to the contrary, the bills might not have been indorsed by the drawer, but

have remained in his hands at the time of the act of bankruptcy. I am, therefore, of opinion, that this, also, is a good objection, and, consequently, that a nonsuit must be entered.

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Mr. Justice BURROUGH (a).—It appears to me to be quite clear that the 92nd section of the statute 6 Geo. 4, is prospective only. I beg to abstain from giving any opinion on the objection raised to the sufficiency of the petitioning creditor's debt. I was a commissioner of bankrupts from the year 1785 to 1816, and perfectly recollect the issuing of the order by Lord *Loughborough*; but the form of the deposition, when the debt arose on bills of exchange, remained the same, and a schedule was under-written, shewing the parties to the bills and the dates, and when they became due, as in the present case. But, as the depositions were not then evidence of the petitioning creditor's debt, or act of bankruptcy, and on the ground that the 92nd section of the statute 6 Geo. 4, is only prospective, I think a nonsuit must be entered.

Mr. Justice GASLNER.—If it were necessary for me to decide whether the 92nd section of the new act were prospective or not, I should wish to consider that point; but I give no opinion upon it, as I concur with my Lord Chief Justice in thinking, that the deposition made by the plaintiff is not sufficient to constitute a good petitioning creditor's debt; and as it is now made conclusive evidence, unless the commission be disputed by the bankrupt within a limited period, every thing should appear upon the face of it, to shew that the debt existed before the act of bankruptcy was committed. Here, the deposition is, at least, equivocal in terms, as it is not stated or shewn, that the bills drawn by the bankrupt were indorsed by him, or out of his hands, at the time of the act of bank-

(a) Mr. Justice Park was at Chambers.

ruptcy. I rest on that objection alone, which is of itself sufficient for us to direct a nonsuit to be entered.

Rule absolute for a nonsuit.

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Tuesday,
Feb. 10th.

CARTER v. CARTER and Another.

A tenant, shortly after he had paid half a year's rent to his landlord, due at *Lady-day* preceding, was called upon by the agent of the ground landlord for ground-rent due previously to *Lady-day*, and which the landlord had refused to pay:—*Held*, that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose: *Held*, also, that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground rent was paid:—and the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear:—*Held*, that the tenant was entitled to recover in an action on the case for a wrongful distress; and that a count, stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was sufficient.

THIS was an action on the case for a wrongful distress. The *first* count of the declaration stated, that, before the grievances therein mentioned, the plaintiff held a dwelling-house and premises as tenant to the defendant *Carter*, at the yearly rent of 50*l.*; that, on the 20th *November*, 1827, the defendants wrongfully and unjustly seized the goods of the plaintiff, being in the said house, of the value of 100*l.*, and sold them for rent alleged to be due and in arrear from the plaintiff to the defendant, whereas, in fact, no rent was due or in arrear.

The *second* count stated, that the defendants wrongfully and unjustly took and distrained the plaintiff's goods for 25*l.* alleged to be due from him to the defendant *Carter* for rent, whereas, in fact, 5*l.* 10*s.* only was due. There were several other counts, in which the plaintiff alleged, that he tendered to the defendant *Carter* a sufficient sum to satisfy the rent due, before and at the time of making the distress; that the defendants did not remove the goods from the premises within five days after making the distress; that they did not sell them for the best price that could be obtained for them; and that they did not return the surplus after the sale. To these were added a count in trover. Plea—Not guilty.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, it appeared that the plaintiff rented a house and shop of the defendant

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Carter, at the rent of 50*l.* a-year, and that the latter held the premises under a lease from the Duke of *Bedford*, subject to a ground-rent of 17*l.* *per annum*; that, shortly after the plaintiff had paid the defendant *Carter* a half year's rent, due at *Lady-day*, 1827, the Duke's agent or steward called on the plaintiff for 17*l.* for a year's ground-rent, due at *Christmas* preceding; that the plaintiff told the agent that he had just before paid the defendant the rent due to him, and requested time to pay the ground-rent; on which the agent said that he would allow him six weeks to pay it. The plaintiff accordingly paid 8*l.* 10*s.* in *July*, and the remaining 8*l.* 10*s.* in *September* following; and the agent stated, at the trial, that he should not have called on the plaintiff for payment of the ground-rent, unless the defendant, as the immediate lessee, had refused to pay. It also appeared, that in *October*, 1827, the plaintiff was called on for the payment of 2*l.* 10*s.*, for three quarters' land-tax, the last of which was due at *Michaelmas* preceding; which he paid, and for which three several receipts were given. In *November* following, the defendant *Carter* claimed from the plaintiff 25*l.* for the half year's rent alleged to be due at *Michaelmas* preceding, when the plaintiff tendered him 5*l.* 10*s.* in sovereigns and silver, and the receipts for the ground-rent and land-tax, amounting to 19*l.* 10*s.*, as above stated. The defendant said he would not look at the receipts, and refused to accept the 5*l.* 10*s.*; and a few days afterwards distrained for 25*l.*, the whole of the rent due. The tender of the above sum of 5*l.* 10*s.*, together with the receipts, was again made to the broker, and refused; and afterwards they were again offered to him with 2*l.* in addition, to cover the costs of the distress; but the broker, after remaining eighteen days on the premises, removed the goods, and sold them by virtue of the distress.

For the defendants, it was insisted, that the payment of the ground-rent was in the nature of a voluntary payment, not being made under immediate pressure, or threat of a

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distress, as the agent of the ground landlord gave the plaintiff time for such payment. His Lordship left it to the Jury to say, whether the sum tendered by the plaintiff to the defendant *Carter*, previously to the distress, and to the broker afterwards, together with the receipts for the ground-rent and land-tax, was sufficient to satisfy the rent then due. They found in the affirmative, and accordingly gave a verdict for the plaintiff—damages, 50*l*.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, and submitted, that the payments of the ground-rent and land-tax were in the nature of a set-off; and that, if the plaintiff could be entitled to deduct them, he should have alleged such payments in his declaration, particularly, as the defendant had received no notice that such payments had been made before he called for the rent which was due from the plaintiff. Besides, the agent of the ground-landlord merely made a claim for the ground-rent, and granted the plaintiff the indulgence he required. A distress was not even alluded to, and it did not appear that the agent called more than once; and a tenant or occupier of premises is not bound to pay ground-rent on a mere request to do so, or, at all events, he cannot claim to deduct it from his landlord, unless he shew that the payment was made by compulsion or under threat of a distress. The only question then is, what rent was in arrear from the plaintiff to the defendant at the time the distress was made? It is quite clear that some rent was due: if so, this action cannot be supported, as the defendant *Carter* had a right to distrain, and if the plaintiff had replevied, and the defendants avowed, the plaintiff might have pleaded the payment of the ground-rent to the original landlord, as in *Sapsford v. Fletcher* (a). But none of

(a) 4 Term Rep. 511.

the counts in the declaration are framed to meet the plaintiff's case; and although in one of them he alleged that he tendered a sufficient sum to satisfy the rent due previously to the distress, yet, the tender, as proved, was merely receipts for the ground-rent and land-tax, and only 5*l.* 10*s.* in money. In *Taylor v. Zamira* (a) the grantee of the annuity had actually *threatened to distrain* for the rent in arrear before the payment was made. Here, it is quite clear that the defendant was entitled to distrain for the whole of the half year's rent due at *Michaelmas*; and, in *Andrew v. Hancock* (b), to an avowry in replevin, for rent in arrear, the plaintiff pleaded in bar payments for land-tax and paving rates, for several years successively, in order to avoid a distress; and that the sums so paid by him exceeded the amount of the rent distrained for; and it was held, that the plea was bad, as it in substance amounted to a set-off, which, according to the case of *Sapsford v. Fletcher*, cannot be pleaded to an avowry for rent.

With respect to the payment of the land-tax, the case of *Stubbs v. Parsons* (c) is decisive to shew, that such payment must be made according to the terms of the statute by which that tax is imposed and regulated. The only legal answer to a distress for rent is payment, or an actual tender of the whole of the sum demanded. Here, too, the ground-rent was paid before the rent distrained for was due; and it, therefore, could not operate as payment of such rent, especially, as it was not made compulsorily, and no previous notice had been given by the tenant to his immediate landlord that such payment had been required or made. At all events, it cannot be considered as payment for a rent then growing due, nor can it operate as an extinguishment of such rent.

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(a) 2 Marsh. 220; S. C. 6 Taunt. Brod. & Bing. 37.
524.

(c) 3 Barn. & Ald. 516.

(b) 3 B. Moore, 278; S. C. 1

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Mr. Serjeant *Andrews* now shewed cause.—If either of the receipts tendered by the plaintiff to the defendants can be deemed to amount to satisfaction, or to operate in lieu of payment of the rent distrained for, this action is rightly brought; and if the plaintiff could not be deemed entitled to recover, he would have no remedy whatever, as part of the rent demanded was actually due, and he, therefore, could not have replevied. The payment of the ground-rent cannot be considered as a voluntary payment; and, although it was only demanded once from the plaintiff by the agent of the ground landlord, yet he proved that several applications had been previously made to the defendant, the immediate lessee, without effect. The payment by the plaintiff cannot be considered less a compulsory payment, because he had time granted him to pay; for he was clearly liable to be distrained on for the ground-rent, when the demand was made. In *Taylor v. Zamira*, Mr. Justice *Dallas* said, that the payment was a compulsory payment; so, here, the plaintiff was clearly liable to the superior landlord, in the first instance, who had a right to distrain on the occupier, although no rent might be due from him to the person under whom he held. So, the payment of the land-tax may operate as payment of rent growing due, as well as of that actually due: for, in *Stubbs v. Parsons*, Mr. Justice *Bayley* said (a): “The law considers the payment of the land-tax as a payment of so much of the rent then due, *or growing due*, to the landlord.” Although it has been said, that neither of the counts in the declaration can be supported, yet that which alleges, that the defendants distrained for 25*l.*, when 5*l.* 10*s.* only was due, was proved in terms at the trial; and, as the rent alleged to be in arrear was reduced to the latter sum by the payments in question, the distress was made wrongfully, and the Jury were fully warranted in finding a verdict for the plaintiff.

(a) 3 Barn. & Ald. 520.

Mr. Serjeant *Bompas* (in the absence of Mr. Serjeant *Wilde*), in support of the rule.—The rent payable from the plaintiff to the defendant *Carter*, and from which the payments in question are sought to be deducted, was not due at the time they were made; the defendants, therefore, had a right to distrain for the whole of the rent, particularly as the payments were not made under distress, or compulsorily; and it is, at all events, doubtful whether the plaintiff could be entitled to deduct the land-tax. The action is not only misconceived, but none of the counts can be supported. If, indeed, no rent were due, and the defendants had no right to distrain, the plaintiff might have been entitled to recover on the count in trover, or if he had paid money in order to redeem the goods taken, in case the distress had been wrongful, as in *Shipwick v. Blanchard* (a); but here, 5*l.* 10*s.* was, at all events, due for rent, and no deductions could, in point of law, be claimed in respect of the payments previously made. The plaintiff should have averred in his declaration, that the payments in question were made on account of the defendant *Carter*, and that he had been called upon to make such payments before the rent due to him accrued.

Lord Chief Justice BEST.—It appeared to me, at the trial, that there had been great oppression on the part of the defendants towards the plaintiff; and the great stand there was, that the payments made by the plaintiff must be considered as voluntary payments. I then thought, and now find that I am supported by decisions, that they cannot be so deemed. Although the plaintiff was tenant to the defendant *Carter*, he was still liable to be distrained on for ground-rent by the superior landlord, who sent his agent to him for such rent. The plaintiff then asked indulgence, as he had just paid the defendant, his immediate landlord,

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(a) 6 Term Rep. 298.

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his rent. The agent then allowed him six weeks for the payment of the ground-rent, at the expiration of which time a moiety was paid, and the other half before the defendant demanded his rent. Although the plaintiff was not, in point of fact, distrained on, he still knew that he was liable to a distress; and yet it has been said, that the payment of the ground-rent must be considered as a voluntary payment. But it is no more voluntary than a donation made to a pauper presenting a pistol to a person passing on the road, and saying, "pray remember the poor." The principle established in *Sapsford v. Fletcher*, and *Taylor v. Zamira*, is, that the payment of ground-rent by the tenant or occupier of premises does not constitute a cross demand, but amounts to payment of so much of the tenant's rent. If, therefore, it amounts to payment, it is not necessary to plead it, and the sum remaining after that payment is deducted, is all that is due to the landlord. Now, in this case, all the defendant's rent had been satisfied by payments for ground-rent and land-tax, with the exception of 5*l.* 10*s.*, which was offered to both the defendants, but which they refused to accept; and, although the receipts for such payments were tendered, they rejected them and distrained for 25*l.*, being the whole of the rent due. The defendants, therefore, were clearly liable to this action; and the count, which alleges that they distrained wrongfully for 25*l.*, when 5*l.* 10*s.* only was due, is adapted to meet the circumstances under which the distress was made. The substantial question is, what rent was in arrear from the plaintiff to the defendant *Carter*, and whether more than 5*l.* 10*s.* was actually due. That sum was not only offered to the defendants, but the additional sum of 2*l.*, to satisfy the costs of the distress, and which the broker refused to accept. When the receipts for the ground-rent and land-tax were tendered to the defendant *Carter*, he ought to have taken them, and not have distrained; but as he distrained for the whole rent due, the distress is wholly wrongful; and, although none of the special counts might be expressly applicable, yet, in

such a case, the plaintiff would be entitled to recover under the count in trover.

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Mr. Justice PARK.—Although I was not in Court, when the rule *nisi* was obtained, it appears to me to be quite clear, from the facts now stated by my Lord Chief Justice, that the payments made by the plaintiff cannot be considered as voluntary payments. Although he was not actually distrained on by the ground landlord, he was still liable to a distress; and when the agent applied for the ground-rent, the plaintiff said, that he had just paid the defendant, his immediate landlord, his rent, and therefore asked for time to pay the ground-rent; and unless his request had been acceded to, the plaintiff would have been liable to an immediate distress. In *Sapsford v. Fletcher*, although it was held, that there could be no set-off to an avowry for rent, yet that the tenant might plead payment of a ground-rent to the original landlord. So, in *Taylor v. Zamira*, it was decided, that the plaintiff, to an avowry for rent, might plead payment of an annuity secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain. Here, the payments made by the plaintiff were for the by-gone ground-rent and land-tax previously due. Although it has been said, that, at the time the ground-rent was paid, the rent in question was not due to the defendant, and therefore, that the plaintiff could not deduct, from rent growing due, payments for the ground-rent of an antecedent half year, on the authority of *Andrew v. Hancock*; yet, there, the tenant made payments for land-tax and rates for six successive years, without deducting them from the rent paid to his landlord in the current year in which such payments were made. But here, the plaintiff was called on for the ground-rent, shortly after he had paid his half year's rent, due at *Lady-day*, and which ground-rent was due

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at *Christmas* preceding; and he sought to deduct it, as well as the land-tax previously due, and paid by him, when he was called on by the defendant for the rent due at *Michaelmas* following. The deductions, therefore, were claimed from the rent demanded within the current year, and which first accrued due after the ground-rent and land-tax had been demanded and paid. It, therefore, appears to me, that the payments in question were good payments, and that there was no colour for the defendants to distrain.

Mr. Justice BURROUGH and Mr. Justice GASLBE, were absent.

Rule discharged (a).

(a) See *Branscomb v. Bridges*, 1 Barn. & Cress. 145, where the goods of a tenant being distrained for rent in arrears, after the amount had been tendered, it was held, that

he might bring an action on the case for an excessive distress; and the Court said, that it had frequently been decided that trover would lie after a wrongful taking.

Wednesday,
Feb. 11th.

SARAH BRIDGES, Widow, v. JANE SMYTH, Spinster.

J. S. demised freehold and copyhold premises to the plaintiff for a term of years, and died before the expiration of the term, when they descended to his heir, who devised them to the

defendant, for life. The defendant refused to take as devisee, claiming title as heir-at-law of the lessor, and as she neglected to be admitted on the death of the devisee, the lord of the manor seized the copyhold, and received the rent. The heir-at-law of the lessor afterwards brought an ejectment against the tenant (the plaintiff), and sued out a writ of possession. The defendant, as devisee, subsequently brought an ejectment against the plaintiff, with a view to defeat the claim of the heir, and succeeded, and laid the demise on the death of the deviser, which was previously to the expiration of the lease:—*Held*, that the defendant could not distrain upon the plaintiff for rent due before or since the determination of the lease, more than three years having elapsed from that period, and she having treated the plaintiff as a trespasser, by bringing the action of ejectment, although the latter continued to occupy the premises from the time of the original letting to the day of the distress.

THIS was an action of replevin. The declaration alleged, that the defendant, on the 10th August, 1827, at the parish of *Elmswell*, in the county of *Suffolk*, took the cattle, goods, and chattels of the plaintiff, and unjustly detained the same, until &c. The defendant, in her first avowry, alleged, that the plaintiff, for thirteen years and one

half of a year, ending at *Lady-day*, 1827, and from thence until &c., held and enjoyed a certain messuage, farm, and lands, in which &c., as tenant to the defendant, by virtue of a demise thereof to the plaintiff, at the yearly rent of 382*l.*, payable half yearly: and that, because the sum of 5,157*l.*, for the space aforesaid, was due and in arrear to the defendant, she well avowed the taking &c., as a distress for the said rent. There was a *second* avowry for two years of the said rent, ending at *Michaelmas*, 1815; a *third*, for thirteen years, ending at *Lady-day*, 1827; and a *fourth* for two years, ending on that day.

To the first avowry, the defendant pleaded in bar, *first*, that she did not hold the premises in which &c., as tenant thereof to the defendant under the supposed demise in the avowry mentioned. *Secondly*, that no part of the supposed rent in the avowry mentioned was, or is, in arrear from the plaintiff to the defendant. And *lastly*, that, after the making of the supposed demise, and before any part of the rent in the said avowry became due, to wit, on the 1st *September*, 1823, the defendant, with force and arms &c., entered into the said premises, and ejected and removed the plaintiff, and kept her so ejected &c., from thence, until &c. There were similar pleas in bar to the three other avowries, and on which issues were joined.

At the trial, before Mr. Justice *Holroyd*, at the last Assizes for the county of *Suffolk*, it appeared that, in 1807, Sir *Harvey Smyth* demised the premises in question, consisting of a freehold and copyhold estate, to the plaintiff, for ten years, from *Michaelmas-day* in that year, at the rent of 382*l.*, payable half yearly, namely, at *Lady-day* and *Michaelmas* in every year. That Sir *Harvey Smyth* died in *October*, 1811, leaving Mrs. *Brand*, his only sister and heir-at-law, who died on the 2nd *March*, 1814, and devised the premises contained in the lease to the defendant, for life, Mrs. *Brand* having, previously to her death, namely, on the 28th *February*, 1812, been admitted to the

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copyhold, which she surrendered to the use of her will. That the defendant refused to take the property as devisee, alleging that she was entitled to it as heir-at-law of Sir *Harvey Smyth*; and as she neglected to be admitted to the copyhold, after the presentment of the death of Mrs. *Brand*, and proclamations duly made in the Lord's Court, a warrant of seizure was awarded and executed on the 12th *December*, 1815; and the lady of the manor afterwards proceeded against the plaintiff, and other tenants, in actions of ejectment, in which she obtained judgments on the 16th *February*, 1816; in consequence of which, the plaintiff paid rent to her, amounting to 200*l. per annum*, for the copyhold premises mentioned in the lease, from *Christmas*, 1815, to *Christmas*, 1820, and from that time to 1823 it was reduced to 170*l. per annum*. That, in *Trinity* Term, 1823, Sir *George Henry Smyth*, as heir-at-law of Mrs. *Brand*, commenced an action of ejectment against the plaintiff, in which the demise was laid on the 2nd *March*, 1814 (the day of the death of Mrs. *Brand*); and judgment having passed by default, he obtained possession by a writ of *habere facias possessionem*, on the 12th *January*, 1824. That the plaintiff formally quitted the premises, in order to allow Sir *George Henry Smyth* to take possession, but returned immediately afterwards, and had ever since continued to occupy them. That, in *February*, 1824, the defendant having learnt that possession had been taken by Sir *G. H. Smyth*, commenced an action of ejectment against the plaintiff, laying the demise on the 2nd *March*, 1814, in order to establish her title as devisee. By the consent rule, Sir *G. H. Smyth* was admitted to defend as landlord, with or without the tenants; and the defendant having recovered in that action, as devisee (a), a writ of possession was prepared for

(a) See *Doe d. Smyth v. Smyth*, 6 Barn. & Cres. 112, where it was held, that, although the defendant at first absolutely refused to take

any benefit under the will of Mrs. *Brand*, still, that it was not such a disclaimer as prevented her from relying on her title as devisee.

her in the early part of the year 1827, but which was not executed, as she refused to pay the sheriff's fees and poundage. It also appeared, that the defendant was admitted to the copyhold premises on the 27th *May*, 1825; and that, before the commencement, and during the progress of the action of ejectment against the plaintiff, she had been made acquainted with the proceedings which had been taken by Sir *G. H. Smyth*. Although the plaintiff had never actually been out of the occupation of the premises, she had never admitted that she held under a demise at 382*l.* a-year, after the death of Mrs. *Brand*, although that sum was proved to have been claimed by the defendant in 1827. On this evidence, the whole of which was left to the Jury, a verdict was taken for the plaintiff for four guineas, and the value of the goods distrained was admitted and found to amount to 2000*l.*

For the plaintiff it was insisted, that, for three years and a half of the rent, namely, the rent up to *Michaelmas*, 1817, the distress was too late, as the lease for ten years, under which it accrued, expired at that time; and that, at common law, the distress should have been made either before the determination of the lease, or within six calendar months afterwards, pursuant to the statute 8 *Anne*, c. 14, ss. 6 and 7; and that there must be a continuance of the landlord's title and the tenant's possession, in order to entitle the former to distrain:—that, as to the residue of the rent which was claimed to have arisen by the holding over since the expiration of that lease, such holding did not create a fresh demise at the rent of 382*l.*, as alleged in the avowries, or of any specific distrainable rent, particularly as the defendant had, since putting in her claim as devisee and accepting the devise, treated the plaintiff as a *tortfeasor* and trespasser, by commencing the action of ejectment against her; and, therefore, that although the defendant might be entitled to recover compensation in an action of trespass

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for the mesne profits, she had, under the circumstances, no right to distrain.

The learned Judge was of opinion, that these objections were well founded, but he gave the defendant leave to move that a verdict might be entered for her, for such sum as the Court should think fit, in case they should be of opinion that the distress could, under the circumstances, be supported.

Mr. Serjeant *Wilde*, in the last Term, accordingly obtained a rule *nisi*, and submitted, that the defendant was, at all events, entitled to distrain for the rent in arrear of the copyhold premises, due since her admission in *May*, 1825. That, although she had avowed for a certain rent alleged to be due under a demise, still, that such rent might be apportioned; and that, as the plaintiff had never been turned out of the possession of the premises, there was, in point of fact, no determination of the original tenancy, nor any thing to amount to an eviction. In the *Second Institute* (a), it is said: "If a man make a lease for years, reserving a rent, if he grant away part of the reversion, the rent shall be apportioned by the common law; and albeit the grantee of part demand or claim more in his action of debt, or avowry, than is due, yet shall he recover so much as the Jury shall find upon a just apportionment to be due." The seizure of the copyhold by the lady of the manor, in 1815, could not be supported, as it was an absolute seizure, and not a seizure *quousque*.

Mr. Serjeant *Storks* now shewed cause. The defendant, under the circumstances, had no right to distrain, for, at the time of the distress, there was no subsisting demise between her and the plaintiff. The lease under which the latter originally held, expired at *Michaelmas*, 1817, and

the defendant treated her as a trespasser, from the death of Mrs. *Brand*, on the 2nd *March*, 1814, on which day she laid her demise in the action of ejectment; and although a writ of possession was not executed in that action, still the defendant had procured it, and was only prevented from putting it in force by motives of economy. The defendant, at first, disclaimed taking under the will of Mrs. *Brand*; nor could she do so, until the Court of *King's Bench* had decided that there had been no legal disclaimer by her: but the plaintiff has never been tenant to the defendant, so as to entitle her to distrain for the entirety of the rent, according to the terms of the original demise as alleged in the avowries; for it was proved that the lady of the manor had received the rent for the copyhold, from 1815 to 1823. It was incumbent on the defendant to shew, not only that the plaintiff was her tenant at the time of the distress, and that she held under the demise as stated in the avowries, but that the rent accrued due during the continuance of such demise. Now, the defendant received no rent from the plaintiff before that lease had expired, nor for several years afterwards, nor did she treat her as her tenant; and although it may be said that the fact of the plaintiff's continuing in possession was sufficient to create a tenancy, yet there was no evidence of a new demise; and, even if there were, the defendant could not have been entitled to distrain for rent due under the original lease, either at the common law, or by virtue of the statute of *Anne*. The defendant was aware of the adverse proceedings by the lady of the manor and Sir *G. H. Smyth*; and although the plaintiff had paid rent to the former for the copyhold premises, which was reduced from 200*l.* to 170*l.* a-year, yet the defendant did not think it right to interfere; and as she did not come in to be admitted after the presentment of the death of Mrs. *Brand*, and proclamations duly made, her right to the copyhold became forfeited,

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and the seizure and judgment in the action of ejectment gave the lady of the manor an absolute dominion over it.

Mr. Serjeant *Wilde*, in support of his rule.—Although the lease granted by Sir *Harvey Smyth* to the plaintiff expired in 1817, yet she continued to hold the premises, and has ever since remained in possession. There has, consequently, not only been no determination of the original tenancy, but it must be assumed that she assented to hold on the same terms. The mere act of seizure of the copyhold premises by the lady of the manor did not amount to an ouster; and, although she obtained judgment in the action of ejectment, she never sued out a writ of possession; and the defendant was afterwards admitted to that part of the property. Although the plaintiff gave up possession to Sir *G. H. Smyth*, on the ejectment brought by him, yet it did not repudiate the defendant's title to the premises, as he merely claimed as heir-at-law, whilst she had a clear and paramount title as devisee. In the action of ejectment brought by the defendant, her only object was to defeat the claim of Sir *G. H. Smyth*. Besides, a writ of possession was never executed by the defendant in that suit, but the plaintiff was allowed to continue in possession. That action, therefore, could not have the effect of destroying the plaintiff's tenancy, which continued from the time of the original demise to the day of the distress, she never having been actually turned out of possession. The plea of *non tenuit*, therefore, cannot be supported, as the plaintiff came in under the original lessor, and continued to hold under the defendant as the devisee of his heir-at-law. Neither was there any evidence to support the plea of eviction, as the terms of the original tenancy had never been legally determined, but the occupation under it continued from first to last. A mere temporary eviction can only have the effect

of suspending the rent during its continuance, but cannot determine a subsisting tenancy; and, although the tenant may have been inconvenienced thereby, it is no answer to an avowry for rent in arrear. The plea of eviction necessarily admits that the tenancy once existed; and, although the original lease might have expired, still the tenancy has not been determined, but must, under the circumstances, be considered as a continuing tenancy.

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Lord Chief Justice BEST.—The plaintiff having pleaded *non tenuit*, among other pleas, to the defendant's avowries, it is only necessary to consider whether she held the premises, in respect of which the rent was alleged to be in arrear, in manner and form as in those avowries is alleged. I am clearly of opinion that she did not. As to what shall amount to a continuing or existing tenancy, is a mixed question of law and of fact. The facts in this case were most properly left to the Jury; and the learned Judge was of opinion that the objections raised for the plaintiff were well founded; and I fully concur with him. The defendant had treated the plaintiff as a trespasser from the 2nd *March*, 1814, being the day of the demise laid in the declaration of ejectment. It is, therefore, impossible to say, that, at any subsequent period, the defendant had considered the plaintiff as her tenant, so as to entitle her to distrain as upon an existing contract between them. The defendant, therefore, must have recourse to some other remedy, as by her own conduct she shewed that the relation of landlord and tenant did not exist between her and the plaintiff at the time of the distress in question.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—The defendant has avowed for

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rent due at *Lady-day*, 1827, at which time it is alleged the plaintiff held the premises as tenant to the defendant, by virtue of a demise thereof to the plaintiff, at the yearly rent of 382*l.*, payable half-yearly; and the plaintiff, in her plea in bar, alleged that she did not hold the premises in manner and form as in the avowry alleged, or, in other terms, that she was not then tenant to the plaintiff. Now, the defendant had precluded herself from any right she might have had to distrain on the plaintiff, by having brought an ejectment against her in 1824, and in which she sought to recover possession, the right to which she alleged to have accrued to her on the 2nd *March*, 1814; the demise having been laid on that day. She, therefore, treated the plaintiff as a trespasser by that action, and cannot afterwards turn round and distrain upon her for rent. It is unnecessary to consider the effect of the statute, 8 *Anne*, c. 14, as the original lease expired in 1817, and no distress was made within six months from that period. Although it has been said, that the object of the ejectment by the defendant was, to defeat the claim of Sir *G. H. Smyth*; yet, that appears to me to make no difference, for the lessor of the plaintiff being entitled to sign judgment against the casual ejector, it would be conclusive against the plaintiff as the tenant or occupier. Although the defendant may have a remedy against the plaintiff by another action, still she had no right to distrain, as she had previously treated the plaintiff as a trespasser by her own act.

Rule discharged.

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Thursday,
Feb. 12th.

DOE on the demise of FISHER v. GILES.

THIS was an action of ejectment.. At the trial, before Mr. Baron *Vaughan*, at the last Assizes at *Shrewsbury*, it appeared, that, by a mortgage deed, dated the 19th *February*, 1827, and made between the lessor of the plaintiff, as mortgagee, of the one part; and the defendant, as mortgagor, of the other part: the latter conveyed the estate and premises sought to be recovered by this action, to the former, his executors, administrators, &c., to secure the sum of 6,200*l.*, advanced by the plaintiff to the defendant. The deed contained a covenant, that, if that sum should not be paid, with interest, at the expiration of six months from the day of the date of the deed, namely, on the 19th *August*, 1827, the plaintiff might enter into and upon, and take possession of the premises mentioned in the deed; and it was further declared and agreed, that, if the above sum, with interest, should not be paid within thirty days from the said 19th *August*, the plaintiff might be at liberty to sell and dispose of the premises as he should deem expedient, without the assent or concurrence of the defendant. The above sum not having been paid on the day stipulated in the deed, the lessor of the plaintiff commenced this action two days afterwards, namely, on the 21st *August*; and no interest having been paid from the date of the deed to the 24th *September* following, (the thirty days having then also expired), the demise in the declaration was laid on that day. The lessor of the plaintiff produced no evidence but the deed in question, when it was insisted, for the defendant, that this action could not be maintained, as he had received no notice to quit; and that, at all events, it was incumbent on the plaintiff, as mortgagee, to demand or require the defendant, as mortgagor, to deliver up the possession of the estate, previously to the service of the ejectment; as the latter must be

A mortgage deed contained a covenant, that, if the principal sum remained unpaid on a given day, the mortgagee might enter; and that, if not paid within a certain number of days from the day fixed for payment, he might sell without the concurrence of the mortgagor: — *Held*, that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit, or demanding possession.

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considered as standing in the situation of tenant to the former, as he was allowed to remain on the premises. A verdict, however, was taken for the lessor of the plaintiff, leave being reserved to the defendant to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion that it was incumbent on the lessor of the plaintiff to demand possession of the estate previously to the commencement of this action.

Mr. Serjeant *Cross*, in the last Term, accordingly obtained a rule *nisi*, and submitted, that a mortgagor, when allowed to remain in possession, must be considered as a tenant at will to the mortgagee, and was, therefore, entitled to a notice to quit, or, at all events, could not be treated as a trespasser by the mortgagee, without a previous notice of the determination of his will. In *Partridge v. Bere* (a), it was held, that a mortgagor in possession of the premises mortgaged, is tenant to the mortgagee; and the Court said, that the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who had the legal title vested in him, and, therefore, that the mortgagor was a tenant within the strictest definition of that word. In *Goodtitle d. Gallaway v. Herbert* (b), Lord *Kenyon* said: "A tenant at will is not a trespasser;" nor can he be considered as such until the will of the lessor is determined. This action, therefore, is premature, as there should either have been a demand of possession, or a regular notice to quit.

Mr. Serjeant *Russell*, on a former day in this Term, shewed cause.—As the mortgage deed contains a covenant or proviso, that, if the sum advanced by the mortgagee to the mortgagor be not repaid, with interest, on or before a given day, the former might enter upon the premises; and

(a) 5 Barn. & Ald. 604.

(b) 4 Term Rep. 681.

that, if such sum were not paid within thirty days from that day, he might sell and dispose of the property secured, without the concurrence of the mortgagor; the latter was neither entitled to a notice to quit or a demand of possession, as there was an absolute forfeiture of his estate by non-payment of the mortgage money on the day stipulated. The mortgagee was not only empowered to enter on the estate, but, after the expiration of thirty days from the day on which he had a right to enter, to sell, without any further authority; and, as the mortgagor had been guilty of an absolute breach of covenant, by non-payment of the money on the day stipulated, the mortgagee was entitled to proceed by ejectment. A mortgagor may be considered as a tenant holding under a lease for years, at the expiration of which the lessor is entitled to enter on the premises demised, without a demand of possession, or a previous notice to quit. In *Keech d. Warne v. Hall* (a), it was held, that a mortgagee might recover in ejectment, without giving a notice to quit, against a tenant who claimed under a lease from the mortgagor, granted after the mortgage, although it was granted without the privity of the mortgagee; and Lord *Mansfield* there said: "The question turns upon the agreement between the mortgagor and mortgagee. When the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense; and, therefore, no notice is ever given him to quit; and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage." Although a mortgagor may, in some cases, be considered as a tenant at will to the mortgagee, yet it can only be where he receives rents from the tenants or

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occupiers, in order to pay the interest by an implied authority from the mortgagee, till he determine his will. Here, however, the mortgagor was in possession, and if the principal sum was not repaid with interest on a given day, the mortgagee had an absolute title in him. In *Moss v. Gallimore*, Lord *Mansfield*, in treating of the relative situations of mortgagor and mortgagee, says (a): "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a *simile*. When the Court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will." And Mr. Justice *Buller* referred to the case of *Keech v. Hall*, and said, that "There the Court did not consider the mortgagor as tenant at will to all purposes, for that a mortgagor is not entitled to emblements." That learned Judge, in the subsequent case of *Birch v. Wright*, said (b), "That a mortgagor has often been called a tenant at will to the mortgagee in Courts of law and equity, is undoubtedly true, but I think inaccurately so; and the expression has been used, when it was not very material to ascertain what his powers or interest were, or to settle, with any great precision, in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases, he is sometimes called tenant at will, and sometimes tenant at sufferance. In *Keech v. Hall*, *Wallace* called him the agent of the mortgagee; and Lord *Mansfield* stated him to be tenant at will to some purposes, but not to others. In *Moss v. Gallimore*, Lord *Mansfield* said:—a mortgagor is not in reality a tenant to the mortgagee; if he were, he must pay rent, but that is not so. To many purposes he is *like a tenant at will*, but he does not pay rent, he *must pay interest* only. If a likeness must be found, I think, as it was put by Mr. Justice *Ashurst*, in *Moss v. Galli-*

(a) 1 Doug. 282.

(b) 1 Term. Rep. 392.

more, a mortgagor is as much, if not more, like a receiver than a tenant at will. In truth, he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee, I mean in ejectments brought for the recovery of the mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will, sometimes back to the time when the mortgage became forfeited, and no objection has ever been made on that account. A mortgagor and mortgagee are characters as well known, and their rights, powers, and interests, as well settled, as any in the law. The possession of the mortgagor is the possession of the mortgagee; and, as to the inheritance, they have but one title between them. The mortgagor has no power of making leases to bind the mortgagee. He cannot, against the will of the mortgagee, do any act to disseise him, and the reason is, because the mortgagee, so long as he receives his interest, is virtually, and in the eye of the law, in possession. The mortgagee has a right to the actual possession whenever he pleases, he may *bring ejectment at any moment that he will*, and he is entitled to the estate as it is, with all the crops growing on it." The authority of that doctrine has never been impugned, but has since been invariably acted upon. Mr. Justice *Buller* also said, in *Moss v. Gallimore* (a): "That expressions, used in particular cases, are to be understood with relation to the subject matter then before the Court." And what fell from the Court in *Partridge v. Bere*, was applicable to the particular circumstances of the case then before them; but, as it did not relate strictly

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to a mortgagee or mortgagor, the relative rights of those parties were not considered. That was an action for diverting a water-course, and the declaration contained an averment, that a certain close was in the occupation of one *Turner*, as tenant to the plaintiff, the reversion belonging to the latter; and it appeared that *Turner*, being tenant for life, had mortgaged the close in question to the plaintiff, for a term of years, provided he, *Turner*, so long lived; and that *Turner* had, since the mortgage, continued in possession, and paid the interest; and, although it was objected that the relation of landlord and tenant did not subsist between a mortgagor and mortgagee, and therefore, that the averment was not supported by the evidence, yet, the defendant was a wrong-doer; and therefore the Court held, that, as the mortgagor was in possession of the mortgaged premises, *by sufferance* of the mortgagee, he was tenant to him; and that, as the legal estate was vested in the latter, he might describe himself as a reversioner in his declaration; and in a note by the learned reporters to that case, it is said (a): "If, in the mortgage deed, there is the usual proviso for the enjoyment of the land by the mortgagor and his heirs, until default in payment, &c., and the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, he is, until payment of interest, or other recognition of tenancy, tenant by sufferance, for he came in by a rightful title, although he holds over *wrongfully*." And, here, the defendant held wrongfully, as the mortgagee was entitled to take possession, in case the sum advanced by him to the mortgagor remained unpaid on a given day. At all events, he held wrongfully after the expiration of the thirty days, when the mortgagee was entitled to sell the premises, (for the recovery of which the present

(a) 5 Barn. & Ald. 605.

action was brought,) without the assent or concurrence of the mortgagor.

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Mr. Serjeant *Cross*, in support of his rule.—There is a wide distinction between the case of a mortgagor remaining in possession of the mortgaged premises, and where they are demised to, or occupied by another, either before or after the mortgage: and here, as the defendant continued in possession with the consent or permission of the mortgagee, he must be considered as a tenant at will; and, if so, the mortgagee ought to have given him notice of the determination of his will, by a demand of possession. In *Powseley v. Blackman* (a), where a mortgage deed contained a proviso for the enjoyment of the land by the mortgagor and his heir, until default in payment, and the mortgagor was in actual possession; it was held, that he might be regarded as tenant for years to the mortgagee, during the continuance of the agreement. In *Smartle v. Williams*, Lord Chief Justice *Holt* said (b): “Upon executing a deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will, and the assignment of the mortgagee could only make the mortgagor tenant at sufferance.” In *Coke Littleton*, Lord *Coke*, in treating of a tenant at will, says (c): “The lessor may, by actual entry into the ground, determine his will in the absence of the lessee; but by words spoken from the ground, the will is not determined until the lessee hath notice.” As, therefore, a tenant at will is entitled to notice of the determination of the will of his lessor before he can be deemed a trespasser, a mortgagor in possession, by the permission of the mortgagee, is entitled to a like notice; and, if this were not so, it would amount to an act of injustice and hardship. In *Keech d. Warne v. Hall*, the defendant was the lessee under a lease made by the mortgagor *after* the mortgage, and the

(a) Cro. Jac. 659.

(b) 1 Salk. 245.

(c) Co. Litt. 55 b.

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latter had determined the tenancy at will by granting such lease, and giving up the possession to another. In *Moss v. Gallimore*, the mortgagor was not in possession, but a tenant for years, under a lease made *previously* to the mortgage; and Mr. Justice Ashburn said (a): "Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an under-tenant, for there can be no such thing as an under-tenant to a tenant at will. The demise itself would amount to a determination of the will." So, in *Birch v. Wright*, Mr. Justice Beller said, that the mortgagor could not be considered as a tenant at will, as he *was not in possession*; and that there could not be a tenant to a tenant at will." In *Thunder d. Weaver v. Belcher* (b), the defendant was let into possession as tenant from year to year, by the mortgagor, *subsequently* to the mortgage to the original mortgagee; and it was, therefore, held, that his assignee might maintain ejectment without a previous notice to quit. But, the case of *Partridge v. Bess*, is a decisive authority to shew, that the relation of landlord and tenant subsists between a mortgagee and mortgager in possession; and, whether the latter be considered as a tenant at will or at sufferance, he is entitled to a notice of the determination of the will of the mortgagee, previously to the commencement of an action of ejectment. *Goodtitle d. Gallaway v. Herbert*, and *Doe d. Foley v. Wilson* (c) shew, that a demand of possession is necessary to support an ejectment against a tenant at will: and, in *Right d. Lewis v. Beard* (d), it was held, that a person let into possession upon an agreement for the purchase of land, cannot be ousted by ejectment, before his lawful possession was determined by demand of possession, or some wrongful act done by him to determine such possession.

Cur. adv. vult.

(a) 1 Doug. 283.

(b) 3 East, 449.

(c) 11 East, 56.

(d) 13 East, 210.

Lord Chief Justice BEST, now delivered the judgment of the Court, as follows:—

This was an action of ejectment by a mortgagee against a mortgagor. By the mortgage deed, if the principal sum remained unpaid on a given day, it was covenanted that the mortgagee might enter, and if not paid within thirty days from the day fixed for its payment, he was at liberty to proceed to a sale of the estate, without the concurrence of the mortgagor. This action was brought two days after the day on which the mortgagee had a right to re-enter for non-payment, and before any interest had been paid on the money lent. It was insisted at the trial, that an ejectment could not be brought until the mortgagee had required the mortgagor to deliver up possession of the estate. My brother *Vaughan*, who tried the cause, reserved, for the consideration of the Court, the question, whether this action could be maintained without a demand of the possession of the estate previous to the service of an ejectment? It has never yet been decided, that it is incumbent on a mortgagee to make such a demand, previously to the commencement of an action of ejectment against the mortgagor. In *Partridge v. Bere*, which was an action brought by the plaintiff for an injury done to his reversion, the Court thought that a mortgagee might describe himself as a reversioner, the mortgagor being in possession of the estate, and said that he was a tenant within the strictest definition of the word. That case comes nearer to the present than any I have been able to find. But that was not a case between the mortgagee and the mortgagor, in which the Court were called upon to decide what were the rights of the one against the other. The defendant, in that case, was a wrong-doer, and had, therefore, no right to object to the plaintiff calling himself a reversioner, as long as he permitted the mortgagor to be in possession of the land. It has been argued, that the mortgagor is tenant at will to the mortgagee; and, therefore, the latter can maintain

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no action against the former till that tenancy is determined. Lord *Mansfield*, in the case of *Moss v. Gallimore*, said: "That a mortgagor was not, properly, a tenant at will to the mortgagee, for he is not to pay him rent." In *Birch v. Wright*, Mr. Justice *Buller* says: "A mortgagor is not considered as a tenant at will in those proceedings which are in daily use between a mortgagor and a mortgagee, I mean in ejectments brought for the recovery of mortgaged lands." This opinion of Mr. Justice *Buller* is directly to the point in question. The words of Lord *Mansfield*, "he is not to pay him rent," are very important. The payment of rent countenances a right to the possession of the land; the payment of interest does not, it relates to the debt, and not to the property pledged. A landlord is not, by taking rent, to induce a man to sow the land, and then turn him out before he can take the crop; and, therefore, a tenant at will has emblements, or may take the crop for his own use (a). Lord *Mansfield* says, in *Keech v. Hall*, "A mortgagor is not entitled to reap the crop, as other tenants at will are, because all is liable to the debt." A mortgagor resembles a person who has executed a statute or recognizance. Whatever such a person does to give value to the property under pledge, is done for the benefit of the creditor. *Barden's* and *Withington's* case was as follows (b): *A.* is bound in a statute to *B.*, and sows the land; *B.* extends the lands, which are delivered to him in execution: it was adjudged, that the connusee shall have the corn sown. The same law in the case of a recognizance. If the mortgagor is not a tenant at will, then the law relative to tenants at will has no application to this case. We must look at the covenant he has made with the mortgagee, to ascertain what his real situation is. We find, from the deed between the parties, that the possession of his estate is secured to him until a certain day,

(a) Co. Litt. 55 b.

(b) 2 Leon. 54.

that, if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee; and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same. If this situation exposes mortgagors to any hardship, they must guard against it by an alteration in the terms of the mortgage deeds. Mortgagees, however, do not find it to their advantage to enter upon the estates, if they can get their interest regularly paid; for, from the time that they get possession, their situation is far from desirable, from the constant state of preparation they must be in, to account to the mortgagor whenever he shall be ready to discharge the mortgage debt. This circumstance has rendered any security for the mortgagor against any hasty actions of ejectment unnecessary. The rule for a nonsuit must therefore be

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Discharged (a).

(a) The same point was determined in the Court of King's Bench, in the last Term, in the case of *Doe d. Roby v. Maisey*, 8 Barn. & Cress. 767, where Lord Tenterden said, "The mortgagor is not

in the situation of tenant at all; or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee."

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BRYANT v. Sir JOHN PERRING, Bart.
(Sued with SHAW and BARBER).

A defendant
may plead mat-
ter *puis darrein*
continuance, al-
though he is un-
der terms of re-
joining issuably,
and taking short
notice of trial.

THIS was an action of *assumpsit*, and brought to recover money had and received by the defendant to the plaintiff's use. The facts were as follows:—In February, 1826, the defendant, who was in partnership with Shaw and Barber, as bankers, in London, stopped payment, and the plaintiff had then a balance in their hands. In August following, an arrangement was made for the benefit of the creditors, and all the defendant's property was to be subject to the discharge of the debts of the firm, after the payment of certain private debts of his own. A letter of licence by deed was granted to the defendant, for two years from the date thereof, in consideration of his undertaking to collect his debts, sell his estates, and convert them into money; at the expiration of which time, the deed was to operate as a release to the respective creditors; and the plaintiff signed the deed as one of such creditors. The deed contained a proviso, that, if certain persons therein named as inspectors, should certify that the defendant should make default in certain payments, or fail in the performance of either of the covenants contained in the deed, the release should be suspended, or cease to operate as against the creditors, who should be remitted to their original claims. The declaration was filed on the 18th November last, and, on the 13th December following, the defendant pleaded the deed as a release, but omitted to set out the clause or proviso by which the release was to be suspended or defeated; to which the plaintiff replied specially, that the inspectors named in the deed, had not certified that the defendant had performed the covenants therein contained; and, on the first day of this Term, he ruled the defendant to rejoin within four days, which expired on the 26th January last; on which day, the de-

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defendant obtained a Judge's order for three days' further time to rejoin, on the terms of rejoining issuably and taking short notice of trial for the last Sittings in this Term. On the evening of the 29th, the defendant pleaded a plea *puis darrein continuance*, alleging that the plaintiff ought not further to maintain his action against him, because he said, that, after the last continuance of this cause, to wit, on the 29th January, 1829, the inspectors named and acting under the deed in the replication mentioned, did certify, that the defendant had, to their satisfaction, complied with all the covenants in the deed contained, on his part to be performed and fulfilled; and this &c., wherefore &c.

On this plea being delivered to the plaintiff's attorneys, they returned it to the defendant's attorney, and signed interlocutory judgment for want of a rejoinder, alleging that the defendant had not rejoined issuably within the terms of the Judge's order.

On a former day in this Term, as
s, obtained a rule nisi, that this
side, as having been irregularly
tiff might pay the costs of this

appucation.

Mr. Serjeant Jones now showed cause, and submitted, that the judgment was regular, as the defendant had not rejoined issuably, and that a plea of *puis darrein continuance*, containing matter of defence which did not exist at the time of the replication, or even when the rule to rejoin was obtained, could not be considered as a rejoinder, much less an issuable rejoinder. The defendant might have given the release in evidence under the general issue; but as he set out a part of it only in his plea, he compelled the plaintiff to reply. When time is given to plead or rejoin, the plea or rejoinder must be confined to matters then in existence, as it is an act of indulgence to the party

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applying. By rejoining issuably, the defendant was bound to answer the replication in terms, and to take issue upon it; but, by pleading a plea *puis darrein continuance*, he introduced new matter, and thus waived or abandoned the previous pleadings in the cause. Such a plea must be treated with the same strictness as a plea in abatement, which is not an issuable plea, as it does not go to the merits; the plea, therefore, was improperly pleaded, as it would not have been in time but for the Judge's order, and it cannot be considered as an issuable rejoinder within the terms of that order.

Lord Chief Justice BEST.—Whether the plea be good or bad, I am of opinion, that the plaintiff was not entitled to sign judgment; he should either have taken issue, or demurred; and, even if the defendant had rejoined issuably, he might have pleaded a substantial matter of defence arising after the last continuance.

Mr. Justice BURROUGH (a).—The plea in question introduces new matter, and we cannot prevent its being pleaded:—it is totally independent of the Judge's order.

Mr. Justice GASLLEE.—The defendant was clearly entitled to put this plea on the record; and, if it were bad in substance, the plaintiff should have demurred to it; but he was not entitled to sign judgment. It was not pleaded by way of a rejoinder, nor did it fall within the terms of the Judge's order; neither did the defendant require that order. He alleges that the plaintiff ought not *further* to maintain his action against him for the reasons therein set forth, and which arose after the last continuance. If the defendant had taken issue on the replication, within the terms of the order, it would not have prevented him from afterwards fil-

(a) Mr. Justice Park was at Chambers.

ing this plea; and, as the plaintiff improperly signed judgment, the rule to set it aside must be made

Absolute with costs.

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VERE v. CARDEN.

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TO a declaration by the plaintiff as indorsee, against the defendant as the acceptor, of a bill of exchange, due on the 5th *December* last, he pleaded a judgment recovered on the same bill, in the preceding *Michaelmas* Term. The plaintiff having treated the plea as a nullity, and signed judgment as for want of a plea after the day it was filed—

To a declaration on a bill of exchange due on the 5th *December*, the defendant pleaded a judgment recovered as of the *Michaelmas* term preceding:—*Held*, that the plaintiff might sign judgment, the plea being false upon the face of it.

Mr. Serjeant *Andrews*, on a former day in this Term, obtained a rule *nisi* that the judgment might be set aside, as it was not signed till after plea pleaded.

Mr. Serjeant *Wilde* now shewed cause, and submitted, that this was clearly a sham plea; and as the bill on which the action was brought was not due until after the term to which the judgment related, the plaintiff was entitled to treat it as a nullity, as it was false upon the face of it; and he assimilated it to a case, where, if the plaintiff's cause of action arose on a day in term, and the defendant pleaded a judgment recovered of the same term, it would be bad upon the face of it. He relied on the case of *Lamb v. Pratt* (a) as being precisely in point, where the Court treated a plea of judgment recovered of a term before the cause of action accrued as a nullity, and said: "If defendants will plead judgments recovered, for

(a) 1 Dow. & Ryl. 577.

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the purpose of delay, let them at least take care that their pleas are good in form."

Mr. Serjeant *Andrews*, in support of his rule, relied on the case of *Young v. Gadderer* (a), where, in an action against the acceptor of a bill of exchange, he pleaded a judgment recovered for the same debt; the Court refused to set aside the plea or permit the plaintiff to sign judgment, although the defendant had admitted the debt, and repeatedly promised the plaintiff to pay it, after he had been served with process in the action: and Mr. Justice *Park* said, that such a plea was an ordinary defence, and that the Court were not to assume that it was false. The plaintiff, at all events, ought not to have signed judgment, but should have applied to the Court to set aside the plea.

But the Court held, that the plea was bad upon the face of it, and that the case of *Lamb v. Pratt* was precisely in point, whilst that of *Young v. Gadderer* was distinguishable, as there the plea did not appear to be bad upon the face of it; that the rule is, that, if it be doubtful whether a plea be good or not, the plaintiff must either demur or move to set it aside; but if it be nonsensical or false, he may treat it as a nullity and sign judgment.

Mr. Serjeant *Wilde* having obtained a cross rule to compute principal and interest on the bill—

The Court ordered it to be made absolute, and the rule for setting aside the judgment to be—

Discharged with costs.

(a) 8 B. Moore, 437; S. C. 1 Bing. 380.

STEWART v. WILLIAMSON.

THE plaintiff, in *January*, 1826, claimed from the defendant 2,148*l.* for the hire and use by the latter of the plaintiff's ship *Albion*, under a charter-party entered into between the plaintiff and defendant in *September*, 1824. The defendant having disputed the claim, both parties consented that it should be submitted to the determination of two arbitrators, who were to be at liberty to choose a third person to act as umpire. Bonds of submission were accordingly prepared and executed by the plaintiff and defendant in the penalty of 3000*l.*, and by which they agreed to abide by the award; and the submission to the reference was made a rule of the Court of *King's Bench*. In *February*, 1826, the arbitrators and umpire proceeded on the reference, and having examined several witnesses on behalf of both parties, which occupied them until the 2nd *April* following, the plaintiff and defendant declared that they had closed their cases. On the 26th, the arbitrators and umpire met, and on their expressing an opinion, that the plaintiff was not entitled to recover any part of his claim, his attorney produced a deed of revocation, under the hand and seal of the plaintiff, dated on the 20th *April* preceding, whereby he revoked his authority to the arbitrators. But, on the 28th, the arbitrator nominated and appointed by the defendant, together with the umpire, made an award, by which they determined that the plaintiff was not entitled to receive any thing from the defendant in respect of his claim, and they also directed the plaintiff to pay a moiety of the costs of the reference. Notwithstanding the award, the plaintiff, shortly afterwards, commenced an action against the defendant in this Court, on the charter-party under which the claim in question arose, and

ance of the award, and that he could not be served with process, he being out of the jurisdiction of the Court, and that the defendant had commenced an action against him on the arbitration bond.

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The plaintiff, having a claim on the defendant, under a charter-party, which the latter disputed, it was, by bonds of submission, referred to two arbitrators and an umpire; and the order of reference was made a rule of Court. The umpire having conducted himself with partiality towards the defendant, the plaintiff revoked his authority to the arbitrators, and went to *Scotland*, where he resided. The arbitrators afterwards made an award, by which they found that nothing was due to the plaintiff, and directed him to pay half the costs of the reference; notwithstanding which, he commenced an action against the defendant on the charter-party, and recovered a verdict and sued out execution. The Court refused to stay the execution, although it was insisted, that the plaintiff was liable to an attachment for non-performance.

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obtained a verdict for 1,500*l.*, at the Sittings after the last term, before the Lord Chief Justice; the defence being, that the ship was not sea-worthy, which the Jury negatived, and which they were fully warranted in doing, by the evidence adduced for the plaintiff.

The plaintiff having sued out execution, the defendant commenced an action against him on the arbitration bond, and, on a former day in this term, made an affidavit of the foregoing facts, and also, that he could not serve the plaintiff with process, although he was advised that he was liable to an attachment for contempt of the order by which the submission was made a rule of Court, as well as for non-payment of the costs directed by the award; for that, shortly after the award was made, the plaintiff had left this country for *Scotland*, where he had ever since resided, and that he had expressed his determination to remain there, in order to avoid the attachment or any other process being executed against him.

Under these circumstances, Mr. Serjeant *Taddy*, on a former day in this term, (*viz.* the 31st *January*.) obtained a rule *nisi*, that, on the defendant's paying into Court, on or before the 9th instant, the sum of 1,500*l.*, being the amount of the verdict found for the plaintiff, together with the costs to be taxed thereon, the execution might be stayed until the further order or direction of the Court. The learned Serjeant submitted, that this was the only mode to compel the plaintiff to appear to process which had been sued out against him in the action brought by the defendant on the arbitration bond, and also for the payment of the moiety of the costs of the reference, which the arbitrators had directed him to pay; and that the plaintiff was clearly liable to an attachment for contempt, for non-compliance with the terms of the order of reference, it having been made a rule of Court; and that the plaintiff's agent had declared, that he (the plaintiff) would not come again on

this side of the *Tweed*, he thereby intending to avoid any proceedings that might be instituted against him at the suit of the defendant.

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Mr. Serjeant *Wilde* now shewed cause, on affidavits, which stated, that one of the arbitrators was an intimate friend of the defendant, that the umpire was nominated and selected by him, and that he refused to proceed with the reference, unless such umpire was appointed; to which the plaintiff, after considerable hesitation acted, in order to avoid the expense of proceedings at law:—that the partiality of the umpire (a sail-maker), in favour of the defendant, was manifest, from the first meeting to the last; that the defendant had given him an order for sails to be furnished to a vessel of his, after he had taken upon himself to act as umpire; and, that the plaintiff, by advice of counsel, caused the submission to be revoked, before the award was made. It was also sworn that the plaintiff was a native of *Scotland*, and resided and carried on business there; that he had seldom any occasion to come to *England*; and that he had no reason to be there since the making of the award.

On these grounds, the learned Serjeant submitted, that the Court would not interfere to deprive the plaintiff of the fruits of his execution, as the defendant had no certain claim against him, either by verdict or judgment, or for an ascertained debt; and that, if the defendant proceeded in his action on the bond, he could only recover the moiety of the costs of the reference. Besides, the damages would be unliquidated, and not in the nature of a debt due from the plaintiff. The costs of the reference could not be set off against the verdict, and the plaintiff had a right to revoke his authority to the arbitrators, on the ground of partiality and improper conduct by the umpire; and also, to resort to an action on the charter-party, to enforce his claim against the defendant; and the verdict of the Jury

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is conclusive to shew, that such claim was well founded in the first instance. If the defendant should think fit, he may institute proceedings against the plaintiff in *Scotland*, where he is domiciled; and he cannot be brought into contempt, as the defendant has not shewn that he knew that the order of reference had been made a rule of Court.

Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie*, in support of the rule.—The plaintiff was, at all events, guilty of a contempt of the rule of Court, by revoking the submission, as the rule was obtained before the reference was proceeded on. Not only the particular sum the plaintiff claimed from the defendant was referred to the arbitrators, but all differences arising under the charter-party on which the plaintiff afterwards brought his action, and recovered a verdict. The defendant was not only justified in commencing his action on the arbitration bond, but was also entitled to proceed against the plaintiff by an attachment, and he only seeks to compel an appearance; and although the umpire might have been guilty of improper conduct, it would have been a ground for setting aside the award; but the plaintiff had no right to revoke his authority, after the evidence had been closed, and the arbitrators were on the eve of deciding that he had no claim on the defendant:—and, as the plaintiff keeps out of the jurisdiction of the Court, the defendant merely seeks, by this application, that he may be compelled to appear, for the purpose of having the action on the bond tried on the merits.

Lord Chief Justice BEST.—When this application was made, I thought it right to grant a rule *nisi*, in order to ascertain whether the plaintiff had revoked his authority to the arbitrators, without any reasonable ground or just cause. If he had, we might have interfered, so that justice might be done between the parties. I fully concur in

the verdict which the Jury found for the plaintiff, and was much astonished that the arbitrators had allowed him nothing in respect of his claim on the defendant. Although the conduct of the umpire might not have been so gross or partial towards the defendant as to vacate the award, yet, as it is sworn that he was employed by the defendant, after he took upon himself to act as umpire, he should at least have answered that fact. But I give no opinion on that point. The arbitrator nominated by the defendant refused to proceed with the reference, unless the umpire were appointed; and as he appeared to act with partiality throughout, the plaintiff revoked his submission, not acting on his own authority, but by the advice of counsel. I, therefore, think that he was not guilty of a contempt of the rule of Court by so doing, as the umpire might, to say the least, have been influenced in favour of the defendant by having been employed by him. Although it has been said, that, as the arbitrators have made their award, the plaintiff's remedy, if any, was to move to set it aside; yet, if it were obtained by undue means, or the arbitrators acted improperly before it was made, I do not think that the plaintiff ought to be deprived of the power of revoking his authority, and which he did six days before the award was executed. If the defendant wishes to pursue his remedy on the bond, the circumstances disclosed by the plaintiff would, in my opinion, be a good answer to the action. The defendant may, if he think fit, adopt proceedings against the plaintiff in *Scotland*, where he is domiciled; and the Lords of Session there have the peculiar province of deciding legally and equitably, according to the just rights of the parties.

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Mr. Justice PARK.—When the application was made, it appeared to me to be *primæ impressionis*, as it amounted, in effect, to compel an appearance by the plaintiff to an action commenced against him by the defendant; or, in

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other terms, to call on us to levy issues to the amount of 1,500*l.*, and order our officer to retain that sum until such appearance should have been entered. The defendant should have commenced an action against the plaintiff, when he revoked his authority; but he did not seek to put the bond in force until after the plaintiff had obtained a verdict against him. It has not been shewn us that the plaintiff withdrew from this country to *Scotland*, for the purpose of avoiding the process of the Court; but it appears by his affidavits that his place of residence is there, and that he has seldom occasion to come to *England*. Although we are not to assume that the umpire was actuated by any improper motives, yet it was highly improper for the defendant to employ him in the course of his trade after he had taken upon himself to act as umpire. Although it has been said, that the plaintiff should have applied to set aside the award, yet it appears to me to be a most singular argument, as he had previously revoked the authority which he gave to the arbitrators; and if a party to a reference has reasonable ground to believe that the arbitrators are acting improperly or unfairly towards him, I think he may revoke his authority at any time before they have made their award.

Mr. Justice BURROUGH.—This appears to me to be a most unfounded application. The arbitrator appointed on behalf of the defendant ought not to have joined the umpire in making the award, after the plaintiff had revoked his authority, and which he was warranted in doing through the improper conduct of the umpire. The award, therefore, is bad upon the face of it; and a Jury have since found that the plaintiff's claim against the defendant was well founded; and my Lord Chief Justice, who tried the cause, concurs in their verdict.

Mr. Justice GASELEE.—It must be admitted, that this

is an application to the discretion of the Court, but I do not recollect that such an one has ever been before made. The defendant should have taken the earliest opportunity of commencing an action on the bond; instead of which, he laid by for more than two years, and did not attempt to put it in force, till the plaintiff had obtained a verdict against him.

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Rule discharged with costs.

BOUSFIELD and Another v. GODFREY.

Thursday,
Feb. 12th.

THIS was an action of *assumpsit* for the breach of an agreement entered into and signed by the plaintiffs and the defendant in *March*, 1826.

Mr. Justice *Park* having, on the 3rd instant, made an order at Chambers, that the defendant should, within two days from that day, produce the original agreement to the plaintiffs' attorney, in order that it might be stamped at the plaintiffs' expense, and also that the defendant should deliver a copy of it to them; and that, in default of such production, the defendant's attorney should deliver to the plaintiffs' attorney a copy of a copy of the agreement, which the defendant's attorney admitted to be in his possession; and that, upon such copy of the copy being read in evidence at the trial, the defendant should be precluded from producing the original agreement, or setting it up to defeat the plaintiffs' action:—

Mr. Serjeant *Cross*, on the 9th instant, obtained a rule, calling on the plaintiffs to shew cause why this order should not be discharged or rescinded. He founded his motion on an affidavit of the defendant, in which he ad-

The plaintiff and defendant signed an agreement on unstamped paper, which was given to a third person to hold for the benefit of all parties. The defendant requested the loan of it for the purpose of taking a copy, which was granted; and the plaintiff, within twenty-one days from the execution, desired the defendant to give it him to get it stamped, which he refused to do, nor did he return it to the party from whom he took it: on being afterwards required to produce it, he swore that it was either lost, or that he had destroyed it; but his attorney admitted that he

had a copy:—the Court ordered the latter to produce such copy, and directed, that, if it were given in evidence duly stamped, the defendant should be precluded from producing the original to defeat it.

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mitted, that the agreement was once in his possession, but that it had never been stamped; that he had changed his residence in February, 1828; and that he believed that it was then lost, or that he had burnt it, as he had never seen it since; that he did not now know where it was; and that he had made diligent search for it a month ago among his papers, but had not been able to find it. The learned Serjeant submitted, that the order could not be sustained, neither could the Court direct its terms to be complied with, the defendant having sworn that the original agreement was not in his custody. But, even if it were, the Court could not compel its production, as all the parties to it would be subject to the penalty imposed by the statute 9 & 10 Wm. 3, c. 25, s. 59 (a). All the parties to the agreement are liable to the penalty; and if the defendants were obliged to produce it, he alone might be called on, although the plaintiffs were *in pari delicto*. They, therefore, had no right to call on him for its production. Although, by the statute 23 Geo. 3, c. 58, s. 5, it is provided, that no agreement, not stamped, shall be deemed to be void, in case it shall be stamped within twenty-one days after the same shall have been entered into; still, the defendant in this case would be liable to the penalty imposed by the former act, as he has stated that the agreement never was stamped; and the time allowed for that

stamping, no party would be sworn to produce it.

(a) By which it is enacted, that "if any deed, instrument, or writing whatsoever, by that act intended to be stamped, shall, contrary to the true intent and meaning thereof, be written or engrossed by any person or persons whatsoever, upon vellum, parchment, or paper, not marked or stamped according to the act, then, and in any such case, there shall be due and paid to his Majesty (over and above the duty), for every such deed, instrument, or writing, the sum of 10*l.*; and that no such deed, &c. shall be pleaded or given in evidence in any Court, until as well the duty, as the said sum of 10*l.*, shall be first paid to the use of his Majesty," &c. &c.

purpose has long since expired. According to the case of *Bateman v. Phillips* (a), a party who claims an interest in a written instrument or agreement may compel the person in whose custody it is to produce it, for the purpose of having it stamped, although such person would be liable to the penalty. There, too, the defendant was not only required to produce the original agreement, but that, if he did not, the plaintiff might be at liberty to read a true copy at the trial, in which case the defendant should be estopped from producing the original. But the Court refused the latter part of the application, and merely directed the original agreement to be produced for the purpose of being stamped. Here, however, that could not be done, as the defendant has stated that it is not in his possession, but that he believes it has been either lost or destroyed. And in *Rippiner v. Wright* (b), where an agreement on unstamped paper was destroyed, it was held, that no parol evidence could be given of its contents, although it was destroyed by the wrongful act of the party who took the objection; and, in the case of *The King v. The Inhabitants of Castle Morton* (c), an unstamped written agreement for the letting a tenement at a certain rent having been lost, it was held, that parol evidence of its contents was inadmissible to prove the value of the tenement.

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Mr. Serjeant *Wilde* now shewed cause, on affidavits, which stated, that the defendant had been in partnership with one of the plaintiffs; and that, being desirous to retire, the other plaintiff was appointed as his successor; that the defendant received 600*l.* on retiring; in consideration of which, the agreement in question was drawn up by him, and by which he engaged not to set up in business against the plaintiffs, and that he would continue to assist

(a) 4 Taunt. 157. (b) 2 Barn. & Ald. 478. (c) 3 Barn. & Ald. 588.

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them for three months; that the defendant requested that the agreement might be deposited with one *Rogers* for the benefit of all parties, to which the plaintiffs acceded; that the defendant afterwards told *Rogers*, that he wished to take a copy of the agreement; that *Rogers* gave it to him for that purpose; that he took it away, and had never returned it to *Rogers*, or caused it to be delivered either to him or the plaintiffs, although they had required him to do so about thirteen or fourteen days from the day of its date, as they wished to get it stamped. Letters from the defendant were also produced, dated in *July* and *August*, 1828, and in which he admitted that the agreement was then in his custody; and his attorney having admitted that he had a copy of the agreement when he attended *Mr. Justice Park*, at *Chambers*, that learned Judge made the order in the terms as above stated.

Under these circumstances, the learned Serjeant submitted, that the attorney was, at all events, bound to produce the copy of the agreement, supposing the original to have been lost. The defendant admitted that he had it, and merely states in his affidavit, that he believed that he had lost or burnt it. He obtained it from *Rogers* by a breach of good faith, who was to hold it as a trustee for all parties; and although it has been said, that the defendant would be liable to a penalty if he produced the original, as it was not stamped previously to its execution, as required by the statute 9 & 10 *W. 3*; yet that statute was virtually repealed by the 23 *Geo. 3*, c. 58, by which parties were allowed twenty-one days for stamping memorandums or agreements, after they should have been entered into; and which statute is still in force; and as the plaintiffs required the defendant to deliver up the agreement to them for the purpose of getting it stamped within that period, and he refused to do so, their right ought not to be defeated, which it necessarily would be, unless the agreement were produced, as the defendant has been

guilty of a breach of it, by having set himself up in trade against the plaintiffs, contrary to the provisions therein contained.

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Mr. Serjeant Cross, in support of his rule.—No fraud can be imputed to the defendant; and, as he has stated in terms, that the original agreement was either lost or destroyed; and that it is not now in his custody, the former part of the order cannot be complied with; and if the copy were deemed to be admissible in evidence, it would tend to prejudice the revenue, as such copy could not be stamped. But the case of *Rippiner v. Wright*, is expressly in point. There, the agreement was reduced into writing, on unstamped paper, and the plaintiff took it from the defendant's attorney and destroyed it; and it was objected, that parol evidence of its contents could not be received, inasmuch as the paper itself could not, if in existence, have been read, not being stamped; and the Court said, "that it is the duty of the parties to an agreement, to take care that, when it is executed, it is properly stamped; and that it is one of the risks attendant upon an omission to do this, that, if any accident happens to the agreement before the stamp is affixed, there is no remedy upon it whatsoever." So, here, the plaintiffs should have seen that the agreement was properly stamped, before it was delivered over to Rogers; and as parol evidence of its contents cannot be received, neither can the copy be admissible in evidence. At all events, if the defendant should be enabled to find the original, previously to the trial, he ought not to be precluded from producing it; and, as it was executed so long since, and he had changed his residence, it might perhaps be mislaid, or he might have overlooked it.

Lord Chief Justice BENTLEY.—I have no hesitation in saying, that, when the application to discharge the order of my brother PARK was made, I felt most strongly against

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the defendant, and my only difficulty was, to prevent him from completing the fraud he anticipated, and which he no doubt had in view, from the time he became improperly possessed of the agreement. But, if we cannot order the copy to be produced, consistently with law, although it might work manifest injustice, the defendant will be entitled to the benefit of the objections which have been raised for him. But his affidavit as to the loss or burning of the original agreement is not only framed in very loose terms, but is positively contradicted by his own letters. He merely swears, that *he believed* that the agreement was lost or burnt; but I have no doubt, that it is still in existence. When it was executed, it was to have been deposited with *Rogers*, as a trustee, and who was to hold it for all parties; and the defendant has not denied the fact stated by the plaintiffs, *viz.* that he prevailed on *Rogers* to allow him, the defendant, to have it, in order to take a copy of it; and the plaintiffs have expressly sworn, that they required him to deliver it to them a few days afterwards, for the purpose of getting it stamped, but which the defendant neglected or refused to do. Besides, the defendant's attorney admits that he has a copy. I therefore feel no difficulty in ordering him to produce it for the purpose of being stamped; and on its being taken to the Stamp-office, the commissioners may, in the exercise of their discretion, permit it to be stamped on payment of the penalty; and if they do, it may not only be given in evidence at the trial, but the defendant ought to be precluded from producing the original to defeat it. I felt some difficulty with respect to the case of *Rippiner v. Wright*, which was pressed upon us by my brother *Cross*, but, by ordering the copy of this agreement to be produced, we shall not impeach the authority of that case. There, no pains had been taken by either of the parties to secure the interests of the revenue; whilst here, the plaintiffs required the defendant to give them the agreement, for the purpose of having it stamped; and we may

now order his attorney to produce the copy for the same purpose. The stamp laws are not to be made an engine to assist the defendant in his iniquity, and defeat the just rights of the plaintiffs; particularly, when they intended to have the instrument stamped within the time allowed them for that purpose. The case would have been far different, if the stamp ought to have been impressed previously to the execution, as the parties would then have been liable to a penalty; but the plaintiffs have been guilty of no offence, as they were justified in signing the agreement, although it was not stamped; and they would have caused the stamp to have been affixed, had they not been prevented by the improper act of the defendant. He, then, ought not to be permitted to take advantage of his own wrong; and it is through his misconduct alone that the revenue has been defrauded. At all events, we may order his attorney to produce the copy, and if it can be stamped, the defendant ought not to be allowed to set up the original to defeat it.

Mr. Justice PARK.—When I made the order for the production of the original agreement, or of the copy, which the defendant's attorney admitted was in his possession, I must say, that I never saw a more flagrant case. The attorney was not only guilty of the grossest prevarication before me at Chambers, but the defendant has now sought to shelter himself under a loose affidavit. Although he admits, that the agreement was to have remained in the hands of *Rogers*, in whose custody it was placed, with the consent of all the contracting parties; and although he swears that he has not seen it since *February*, 1828, yet that fact was contradicted by his own letters, in which he admitted that it was in his custody in the month of *August* in that year. Although in *Rippiner v. Wright*, it was decided that parol evidence to prove the contents of an unstamped agreement, destroyed by one of the parties to it, was properly rejected, yet, if

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the plaintiff below, for himself, his heirs, executors, and administrators, did thereby agree with the defendant below, his heirs, executors, and administrators, to purchase the said freehold and customary messuages, lands, and hereditaments thereinbefore mentioned and described, and to pay the defendant below, his executors and administrators, for the same, the said sum of 1,800*l.* on the said 2nd day of *February* then next, on having the same conveyed and surrendered to him, the plaintiff below, his heirs and assigns, by the defendant below, or his heirs;—and it was thereby further agreed, that the plaintiff below should bear all the expense, costs, and charges of the conveyance and surrender to him of the said freehold and customary hereditaments and premises, and of any fines, recoveries, or other assurances necessary to convey and surrender the same respectively; and it was further agreed by and between the said parties to the agreement, that the defendant below, his heirs, executors, and administrators, should receive the rents, and pay all out-goings in respect of the said freehold hereditaments up and home to the said 2nd day of *February* then next;—and, after reciting, that proceedings, both at law and in equity, were then pending between the defendant below and Sir *Henry Protheroe*, in which proceedings at law the defendant below was plaintiff, and sought to recover from the said Sir *H. Protheroe* six years' rent, at 80*l.* per annum, due the 2nd day of *February* then last, for and in respect of the said customary hereditaments and premises, under and by virtue of a certain agreement made between the defendant below and the said Sir *H. Protheroe*;—it was and is by the said agreement further agreed and declared by and between the said parties thereto, that the plaintiff below, his heirs, executors, and administrators, should have and receive the said arrears of rent so claimed to be due from the said Sir *H. Protheroe*, for his and their own use and benefit, and also the said rent due from the said Sir *H. Protheroe*, or to become due, for the current year,

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ending on the 2nd day of *February* then next; and also, that the plaintiff below, his heirs, executors, and administrators, should have and be entitled to all sums of money that could be recovered from the said Sir *H. Protheroe*, for and in respect of dilapidations and wants of repair of and in the said customary hereditaments and premises; and it was thereby further agreed, that the plaintiff below, his heirs, executors, and administrators, should be at full liberty to use the name or names of the defendant below, his heirs, executors, and administrators, in the proceedings at law and in equity then pending between the defendant below and the said Sir *H. Protheroe*; and also in any other action or actions, suit or suits, which the plaintiff below, his heirs, executors, and administrators, should think proper to commence and prosecute against the said Sir *H. Protheroe* for the recovery of the said arrears of rent, or of the current year's rent, or for dilapidations, or wants of repair, of and in the said customary hereditaments and premises; and it was and is thereby further agreed, that the plaintiff below should bear, pay, and discharge the costs of the defendant below in the proceedings then pending, and indemnify him, the defendant below, his heirs, executors, and administrators, of, from, and against all costs and charges of any future proceedings that might be had by the plaintiff below, in the name of the defendant below, his heirs, executors, and administrators, against the said Sir *H. Protheroe*: as by the said agreement (reference being thereunto had,) fully appears; and, the said agreement being so made as aforesaid, afterwards, to wit, on the 14th *December*, 1823, at *Chesham* aforesaid, it was, at the special instance and request of the defendant below, agreed by and between the plaintiff below and the defendant below, that the price or money to be paid by the plaintiff below to the defendant below for the said freehold estate and tenement in the said articles of agreement first mentioned, should be a certain sum of

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money, to wit, the sum of 500*l.*, part of the said sum of 1,300*l.*, and that the price or sum to be paid by the plaintiff below to the defendant below, for the said customary tenements and premises in the said agreement also mentioned, should be the residue of the said sum of 1,300*l.*, to wit, the sum of 800*l.*, subject to the terms in the said agreement specified; and thereupon, afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, in consideration thereof, and that the plaintiff below, at the like special instance and request of the defendant below, had then and there undertaken, and faithfully promised the defendant below, to perform and fulfil all things in the said agreement contained, on his (the plaintiff's below) part to be performed and fulfilled, as such purchaser as aforesaid; he, the defendant below, undertook, and then and there faithfully promised the plaintiff below, to perform and fulfil all things in the said agreement contained, on his (the defendant's below) part and behalf to be performed and fulfilled, as such vendor as aforesaid; and, although the defendant below, in part performance of the said agreement, and of his said promise and undertaking, did, afterwards, to wit, on the 2nd *February*, 1824, at *Chapstow* aforesaid, sell and convey the said freehold tenements and premises in the said agreement first mentioned, to the plaintiff below, and his heirs and assigns, at and for the said sum of 500*l.*; and the plaintiff below then and there paid the said sum of 500*l.* to the defendant below, upon the terms aforesaid; and, although the plaintiff below was afterwards, to wit, on the said 2nd *February*, in the year last aforesaid, and from thence hitherto, ready and willing to accept, receive, and take, of and from the defendant below, a surrender to him, the plaintiff below, of the said customary tenements and premises in the said agreement mentioned, at and for the said sum of 800*l.*, upon the terms aforesaid, and to bear all the expense, costs, and charges of such surrender, and all necessary assurances in that behalf, and to pay the said sum

of 800*l.*, and complete the said purchase on his part and behalf, in all respects, upon the terms aforesaid, to wit, at *Chepstow* aforesaid; and, although the plaintiff below, afterwards, to wit, on &c. last aforesaid, and oftentimes afterwards, offered to the defendant below to complete the said purchase of the said customary tenements and premises, with the appurtenances, upon the terms aforesaid, and requested the defendant below to sell and surrender to him, the plaintiff below, the said customary tenements and premises, upon the terms aforesaid, to wit, at *Chepstow* aforesaid; yet the defendant below, not regarding the said agreement, nor his said promise and undertaking, but contriving, &c., did not, nor would, on the said 2nd *February* in the year last aforesaid, or at any other time, surrender or convey to the plaintiff below, the said customary tenements and premises in the said agreement in that behalf mentioned, or any part thereof, upon the terms aforesaid; but the defendant below had wrongfully neglected and refused ever to surrender the said customary tenements and premises to the plaintiff below, according to the said agreement, and wrongfully discharged the plaintiff below from any further performance by him of the said agreement on his part, contrary to the agreement and the said promise and undertaking of the defendant below, to wit, at *Chepstow* aforesaid: by reason whereof, the plaintiff below had been deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the purchase of the said customary tenements, and had also been put to the expense of 500*l.*, in endeavouring to obtain the completion of such purchase, and had also lost and been deprived of all benefit and advantage of divers monies by him paid, and divers expenses by him incurred, to the amount of 1,000*l.*, in repairing and improving the said tenements, by the consent and sufferance of the defendant below.

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There were two other special counts for the breach of the agreement: to these were added the common money counts. The defendant below pleaded *non assumpsit*; and the Jury found a general verdict for the plaintiff below, and final judgment was accordingly entered up on the whole of the declaration.

The defendant below afterwards brought a writ of error, assigning general errors; and the plaintiff below joined in error.

The cause now came on for argument.

Mr. *Curwood*, for the defendant below (plaintiff in error).—The judgment was erroneous, inasmuch as the agreement declared on in the first count was void in law, upon the face of it, as it was an agreement for maintenance, champerty, and the purchase of a pretended title; and, as a general verdict has been entered on all the counts, and entire damages assessed, the judgment of the Court below cannot be sustained. *Holt v. Scholefield* (a). No person can be allowed to purchase the produce of a suit; and, as the agreement in this case is entire, and one part cannot be separated from the other, the whole is void. The purchaser not only acquired, under the agreement, a right to prosecute existing actions and suits, but also to use the name of the vendor in any action he, the purchaser, might think fit to commence against the occupier for dilapidations. If the antient law, with regard to maintenance and champerty, were not relaxed, there can be no question but that this agreement would have been illegal; and there is no principle to be deduced from any decision, whereby a party is permitted to purchase a right to continue an existing action, much less to institute an original suit. The purchasing of a right of suing was a practice so much abhorred, that it was a main reason why a

(a) 6 Term Rep. 694.

choses in action was not assignable at common law, because no man should purchase any pretence to sue in another's right; but that principle has been since relaxed in favour of bonds. In *Rolle's Abridgment*, it is said (a): "If *A.* be bound to *B.* in 20*l.*, *B.* may give and deliver this obligation to a stranger, and the stranger may justify the detaining of the obligation, by this gift, against the obligee; for, though the debt cannot be granted over, yet the parchment may." So, in *Coke Littleton*, it is said (b): "If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, *vis.* the parchment and wax, to another, who may cancel and use the same at his pleasure." But, although a debt or bond may be assigned over, it must still be sued for in the name of the original creditor or obligee; and a Court of equity, considering, that, in a commercial country, nearly all personal property must necessarily lie in contract, protects the assignment of a *choses in action* as much as the law does that of a *choses in possession*. So, although commercial instruments, such as bills of exchange, bottomry and *respondentia* bonds, and policies of assurance, are assignable, still the exception is founded on the law or custom of merchants. Formerly it was said, that a party might be guilty of maintenance, for barely going along with another to inquire for a person learned in the law (c); and that a man might advise another what counsel he should consult, but that he must not give his advice: but that doctrine cannot be now sustained. The antient principles of the law must be adapted to the exigency of modern times. The established principle with regard to champerty is, that no man can purchase litigation; and this has invariably been acted upon and adopted. The statute of *Westminster 1st*

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(a) Vol. 2, p. 46, tit. "Grants," (c) Hawk. P. C., Book 1, c. 83, (G.) "Choses in action," pl. 2. s. 6.

(b) 232 b.

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(3 *Edw.* 1, c. 25) enacts, that no officer of the king, by himself, nor by other, shall maintain pleas, suits, or other matters hanging in the King's Courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the king's pleasure. Lord Coke, in commenting on that statute, says (a), that, regularly, champerty is *pendente placito*; and that leases for years, and other goods and chattels, debts, and duties, are within the words, "or other things" mentioned in the act. And, therefore, by the agreement in question, the purchaser was to have the whole of the rents and profits; and the by-gone rents would not have passed to him, but would have remained the property of the vendor, in case the agreement had not been executed, it amounts to champerty, and vitiates the whole of the contract; especially, as it does not merely refer to by-gone rents, but gives the purchaser a right of litigation, by allowing him to use the name of the vendor in any action the purchaser *might think fit to commence* against the occupier for dilapidations.

Mr. Campbell, *contra*, was stopped by the Court.

Lord Chief Justice BEST.—The principle formerly established with respect to champerty and maintenance, has long since been relaxed (b). The only question in this case is, whether the agreement, as set out in the first count of the declaration, is illegal, as disclosing champerty upon the face of it. Champerty, according to Lord Coke (c), is a bargain with the plaintiff or defendant in any suit, to have part of the land, or any thing out of it, or part of the debt, or other thing in plea or suit, if the

(a) 2nd Inst. 208.

and *choses in action* in *Master v.*

(b) See the comments of Mr. Justice Buller on maintenance, *Miller*, 4 Term Rep. 340.

(c) 1st Inst. 368 b.

party that undertakes it prevails therein: and, in the *Second Institute*, that learned writer takes a distinction between ministers of the king and officers of his Courts, and strangers. The purchase of a matter in suit, *pendente placito*, by a person in office, is champerty; but, it is not so, if the purchase be by a stranger. Here, the agreement was to enable a *bona fide* purchaser of an estate to recover rents due and in arrear; and, also, to recover for injuries or dilapidations previously to the purchase. The agreement applies to bye-gone rents, for which suits had been instituted and commenced by the vendor; and, to say that the agreement as to the sum to be recovered for past dilapidations, is champerty, would be carrying the law further than was ever done in antient times, when it was necessary for the then existing state of society. We are, therefore, of opinion, that the agreement is good, and, consequently, that the plaintiff below is entitled to judgment.

Judgment affirmed.

END OF HILARY TERM.

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AN
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TO THE
P R I N C I P A L M A T T E R S.

ABATEMENT.

See MISNOMER.

ACKNOWLEDGMENT.

See FINES & RECOVERIES, 3.

ACT OF BANKRUPTCY.

See BANKRUPT, 5, 8.

ACTION ON THE CASE.

See CARRIER.

EVIDENCE, 4.

1. The charterers of the plaintiff's ship for three voyages, on her return home from the second, removed the anchors and cables to the defendant's wharf. Shortly afterwards the ship was seized under an Admiralty warrant, and sold for debts due on bottomry bonds, and the wages of the crew. Four days previously to the sale, the plaintiff demanded the anchors, &c., from the defendants, they not being included in the sale account of the ship, and they refused to deliver them up:—*Held*, that the removal of the articles from the ship to the wharf was no injury to the plaintiff's reversionary interest. *Ferguson v. Cristall, H. 9 G. 4. Page 524*

ADMINISTRATOR.

See PRACTICE, 18.

ADVOWSON.

See DEED, 2.

PLEADING, 7.

AFFIDAVIT.

1. A rule *nisi* for an attachment for non-payment of money, pursuant to an award, was intitled, "In the Matter of *A. and B.*;" but the affidavit of service was intitled, "Between *A. B.*, plaintiff, and *C. D.*, defendant:"—*Held*, irregular, as the affidavit should have been intitled the same as the rule. *In re Houghton and Fallows, M. 9 G. 4. 452*

AFFIDAVIT TO HOLD TO BAIL.

See PLEADING, 8.

1. The defendant was arrested on an affidavit, which stated, that, by a memorandum in writing, bearing date the 11th *August*, and signed by the defendant, he undertook to be answerable to the creditors of certain persons using the style and firm of *W. M. and J. M.*, for the amount of the debts of such creditors, on their (the creditors') undertaking not to issue a commission of bankrupt, or sue out process, against *W. M. and J. M.*, on or before the 16th *August*

then next; that the plaintiffs were creditors [of *W. M.* and *J. M.*; and that the latter were indebted to the former, in the sum of 1,000*l.*; and that the plaintiffs had not, nor, as the deponent was informed and believed, had any of the other creditors, caused a commission of bankrupt, or any process, to be sued out against *W. M.* and *J. M.* before the 16th *August*:—*Held*, insufficient, on the ground that an undertaking by all the creditors not to sue out a commission or process, was a condition precedent, and ought to have been alleged in the affidavit. *Elworthy v. Maunder*, *M. 9 G. 4.* 482

AGENT.

See EVIDENCE, 2.
PRACTICE, 14.

AGREEMENT.

See ASSUMPSIT, 1.
EVIDENCE, 4.
LANDLORD AND TENANT, 1.
PLEADING, 4, 9.
STAMPS, 8.

ALLOTMENT.

See INCLOSURE-ACT.

AMENDMENT.

See FINES & RECOVERIES.
PRACTICE, 14.

1. The plaintiffs commenced an action against the defendant, as administratrixes—Plens, the statute of limitations, and that the plaintiffs were not administratrixes of the deceased, at the time of the commencement of the suit. The letters of administration were not taken out till after the action was brought, and the statute of limitations would have been a bar to a new action. The plaintiffs being surviving partners as well as administratrixes of the deceased, the Court

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allowed the writ and declaration to be amended, by describing them in their former character, on payment of costs by the plaintiffs, and allowing the defendant to plead *de novo*. *Taylor v. Lyon*, *H. 9 & 10 G. 4.* 586

ANSWER IN CHANCERY.

See EVIDENCE, 5.

APPOINTMENT.

See DEVISE, 2.
POWER.

APPROPRIATION.

See BILLS OF EXCHANGE, 1.

ARBITRATION.

See AWARD.

ARREST.

See BANKRUPT, 5.
COSTS, 2.
PRACTICE, 3, 6, 11.

ARREST OF JUDGMENT.

See LIBEL, 1.
PLEADING, 7.

ASSIGNEE.

See BANKRUPT.
PLEADING, 1, 3.
TROVER, 3.

ASSUMPSIT.

See BANKRUPT, 2, 5.
BROKER.
EVIDENCE, 2.
FRAUDS, STATUTE OF.
PLEADING, 4.
PRACTICE, 17.

1. The plaintiff sued the defendant in *assumpsit* for the breach of the following written agreement, signed by the latter, *viz.* "I hereby agree to remain with Mrs. *L.* (the plaintiff's wife) for two years from the date

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hereof, for the purpose of learning the business of a dress-maker, &c.:—*Held*, that this agreement did not support a declaration stating, that, in consideration that the plaintiff, at the request of the defendant, would receive her into his service, and cause her to be taught the business of a dress-maker, she agreed to remain in such service for the space of two years: nor was such agreement binding, as it contained no engagement by the plaintiff or his wife to teach. *Lees v. Whitcomb*, T. 9 G. 4. 86

2. The plaintiff kept a day-school, at which the defendant's daughter was the only boarder. At the end of the first quarter, the plaintiff's charge for schooling was sent to the defendant and discharged. Four days after the commencement of the second quarter, the child was taken ill and sent home, and did not return to school again:—*Held*, that the defendant was liable for the whole quarter, although there was no express contract for a quarter's notice previously to the removal of the child. *Collins v. Price*, T. 9 G. 4. 233

ATTACHMENT.

See PRACTICE, 12.

1. A rule nisi for an attachment for non-payment of money, pursuant to an award, was intitled, "In the Matter of A. and B.;" but the affidavit of service was intitled, "Between A. B., plaintiff, and C. D., defendant:"—*Held*, irregular, as the affidavit should have been intitled the same as the rule. *In re Houghton and Fallows*, M. 9 G. 4. 452

ATTORNEY.

See AWARD, 3.

DEED, 4.

PRACTICE, 7, 15.

1. A gentleman who had taken the degree of Bachelor of Arts at Cam-

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bridge, articulated himself to an attorney for three years, but served only two months, and abandoned the contract. After the expiration of the three years mentioned in the original articles, he was assigned to another attorney, with whom he served two years and ten months:—*Held*, that, as the original articles had expired previously to the assignment, the service under the assignment was not a service within the terms of the statute 1 & 2 Geo. 4, c. 48, s. 1. *Ex parte Unthank*, M. 9 G. 4. 453

AWARD.

See COSTS, 2.

PRACTICE, 7.

1. Debt is maintainable against an executor on an award made in pursuance of a submission by him after the death of his testator, and a plea of *plene administravit* is no bar to the action; as the executor, by submitting to a reference, without protesting against the reference being taken as an admission of assets, admits that he has assets. *Riddell v. Sutton*, T. 9 G. 4. 345

2. By an agreement, after reciting that divers disputes and differences had arisen and were depending between the plaintiff and defendant, as executrix, respecting certain unsettled accounts between them, and that, for finally settling such differences, it was agreed that the matters in dispute should be referred to the final award of two arbitrators. Plea, by the executrix, that no evidence was offered of assets, before the arbitrators, nor did she admit that she had any:—*Held*, ill, on general demurrer, as it imputed misconduct to the arbitrators, which is not the subject of a plea, but only a ground to apply to the Court to set aside the award. *Ibid.*

3. In *assumpsit* against an attorney for negligence in the conduct of a

suit, the declaration contained several special counts, and the usual money counts. The defendant paid money into Court, sufficient to cover the plaintiff's demand on the latter counts. The cause was referred under an order of *Nisi Prius*, and the arbitrator found that the plaintiff had *good cause of action* for 23*l.*, and directed a verdict to be entered for him for that sum. Judgment was entered up on the whole declaration, and costs taxed accordingly:—*Held*, that the award was sufficiently certain, as the arbitrator had, in effect, ordered a general verdict to be entered for the plaintiff on the whole of the declaration. *Dicas v. Jay*, T. 9 G. 4. 448

4. Although the objections to an award ought to be specified in the rule *nisi* to set it aside, yet the Court is not precluded by the omission from entering into any valid objection that may be raised to the award. *Ibid.*

BAIL.

See PRACTICE, 10, 11.

BAIL-BOND.

See PRACTICE, 11.

1. In an action on a bail-bond, by the assignee against the sureties, the declaration stated the arrest of the principal by virtue of a *capias* sued out of the Court of our Lord the now King, before &c., then *his Majesty's Justices of the Bench*, at *Westminster*; and averred the condition of the bond to be, that, if the principal should appear, according to the exigency of the said writ, in the said Court, on &c., the bond was to be void: Breach—non-appearance according to the exigency of the writ. On the production of the bond, the condition was, for the appearance of the principal “before our Sovereign Lord the King, at *Westminster*, on &c., to answer the plaintiff in a plea of trespass, and

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also to answer him according to the custom of the King's Court of Common Bench.”—*Held*, to be no variance. *Crofts v. Stockley*, T. 9 G. 4. 81

2. In an action on a bail-bond, it is not necessary to aver in the declaration that the writ under which the party was arrested was issued on an affidavit of debt, or that the sum sworn to was indorsed on the writ. *Sharpe v. Abbey*, M. 9 G. 4. 312

BANKERS' BOOKS.

See EVIDENCE, 3.

BANKRUPT.

1. The Court of G. P. has no power to compel assignees of a bankrupt to enter of record the proceedings under the commission, in order to make them admissible in evidence under the 96th section of the statute 6 Geo. 4, c. 16. The application for that purpose must be made to the Lord Chancellor. *Johnson v. Gillett*, T. 9 G. 4. 8

2. The master of a ship, as agent for the owners, entered into a charter-party with the freighter to take a cargo from *London* to *Port-au-Prince*, and to receive a homeward cargo from the freighter's agents there. Previously to the ship's arrival, the outward cargo was assigned by the freighter to Messrs. C. & B. as a security for advances made and to be made by them. The freight of the outward cargo not having been paid, the master attached the goods whilst in the hands of the bankrupt's agents, under the judgment of the Court at *Port-au-Prince*; and, the agents having declined to supply a homeward cargo, the master put up the vessel as a general ship, and procured a return cargo for his owners, who received the freight on the ship's arrival at *London*. The freighter having be-

come bankrupt subsequently to the assignment to Messrs. C. & B.:—*Held*, that his assignees could not recover the proceeds of the outward cargo, or the freight earned on the homeward voyage, in an action for money had and received. *Kymer v. Larkin*, T. 9 G. 4. 183

3. A plea of bankruptcy is no bar to a declaration framed in *tort*, charging the defendant, a stock-broker, with having sold the plaintiff's stock (under a general power with which he and his deceased partner were entrusted), without her permission or direction, and concealing the sale. *Ann Parker v. Crole*, T. 9 G. 4. 150

4. An objection to the sufficiency of depositions to establish an act of bankruptcy, must be made at the trial. *Jacobs v. Latour*, T. 9 G. 4. 201

5. A trader in the *Fleet Prison*, under an arrest for debt, eight days before the suing out of a commission of bankrupt against him, obtained a day rule, and went to an insurance office to receive a sum of money that was due to him. The defendant, to whom the bankrupt was indebted, knowing that he was about to receive the money, without any communication from him, met him at the office, and procured payment of his debt out of the money received by the bankrupt. The payment was made on the 8th June, the debtor having been committed to prison the 19th April preceding; and on the 18th June, a commission issued against him, on an act of bankruptcy committed by his lying in prison. In *assumpsit* by the assignees, for money had and received by the defendant to their use, the *Jury* having found that there was no fraudulent preference, and that the defendant did not know of his debtor's insolvency and imprisonment at the time of the payment:—*Held*, that the payment was protected, under the 82nd section of the statute 6 Geo. 4,

c. 16, and was not a fraudulent preference within the exception in that clause. *Churchill v. Crease*, M. 9 G. 4. 415

6. The 44th section of the statute 6 Geo. 4, c. 16, which enacts, that "every action brought against any person for any thing done in the pursuance of the act, shall be commenced within three calendar months next after the fact committed," does not apply to actions against assignees, who only act in the disposition and distribution of the property of the bankrupt, and not under any power conferred on them by law, or for any special purpose under the act; for, *the act done* applies to acts done for the purpose of taking possession of the bankrupt's property by the commissioners, or messengers acting under their warrant. Therefore, trover for a chariot seized by assignees on the premises of the bankrupt, was held to be maintainable, although the action was not commenced by the owner, against the assignees, within three months after the seizure. *Caruthers v. Payne*, M. 9 G. 4. 429

7. The plaintiff ordered a chariot to be built, which was to be finished according to certain directions, and for which he paid; and, after it had been finished in other respects, he ordered a front seat to be added; but the builder not executing the order, the plaintiff sent for the chariot several times, and the builder promised to deliver it. Subsequently, the plaintiff said he did not want the chariot, and ordered it to be sold; and it was standing in the builder's warehouse for that purpose, the front seat not having been added, when a commission of bankrupt was issued against the builder, and his assignees seized and sold the carriage under the commission:—*Held*, that the plaintiff had a sufficient property in the chariot to maintain trover, and that it did not

794 BILLS OF EXCHANGE.

pass to the assignees, as being in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner, within the 72nd section of the statute. *Ibid.*

8. The 92nd section of the statute 6 Geo. 4, c. 16, is prospective, and only applies to commissions to be issued after the passing of that act, as it binds the bankrupt if he does not give notice to dispute the commission within two months after the adjudication. *Key v. Cook, H. 9 & 10 G. 4.*

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9. The deposition of a petitioning-creditor, that the bankrupt was indebted to him, upon and by virtue of certain bills of exchange, at and before the date and suing forth of the commission, which bills appeared, by a schedule under-written, to have been drawn and indorsed by the bankrupt, is not sufficient, as it should have been shewn that the bills were indorsed to the petitioning-creditor before the act of bankruptcy. *Ibid.*

BARON AND FEME.

See Costs, 1.

1. A tradesman cannot recover the value of articles of dress furnished to a wife, if the husband allow her a sufficient supply, and the tradesman make no inquiry as to the capacity of the wife to contract: at all events, an express or implied assent by the husband must be shewn. *Seaton v. Benedict, T. 9 G. 4.*

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BILLS OF EXCHANGE.

See EVIDENCE, 2.

1. The defendant accepted two bills of exchange, drawn on him by T. C., which the latter indorsed and paid into his bankers' (the plaintiffs), who entered the amount as cash to the credit side of T. C.'s account in their books. The bills having been

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dishonoured by the defendant, the plaintiffs entered their amount to the debit side of T. C.'s account; and shortly afterwards the defendant paid the amount of both bills to T. C., but did not require them to be delivered up. T. C. continued his banking account with the plaintiffs for three years after the bills became due, and paid in several sums to his credit, sufficient to cover all the items to his debit prior to the date, and including the amount of the bills. T. C. afterwards became bankrupt, and the plaintiffs proved their debt under his commission, without noticing the bills, and, a year afterwards, sued the defendant, as acceptor, having made no previous demand on him in respect of them:—*Held*, that he was not liable. *Field v. Carr, T. 9 G. 4.*

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2. In an action by the indorsee against the acceptor of a bill of exchange, the date of which appeared to have been altered by the drawer after acceptance, it is incumbent on the indorsee to shew that the alteration was made previously to the indorsement, or before the bill was parted with by the drawer. *Hewman v. Dickenson, M. 9 G. 4.*

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BISHOP'S REGISTER.

See EVIDENCE, 7.

BLANKS.

See DEED, 1, 3, 4.

BOND.

See PLEADING, 10.

BOSTON COURT OF REQUESTS ACT.

See Costs, 4.

BROKER.

See MONEY HAD AND RECEIVED.

1. It is the duty of a sworn broker

of the city of *London*, to charge his principal only the cost price of articles purchased for him, in addition to his commission; and, the principal having averred, in an action of *assumpsit*, that the broker had charged him a greater price than the cost price, which the plaintiff had paid:—*Held*, that it was sufficient proof of such averment, to produce a running unsettled account between the parties, by which it appeared that the principal had paid more than the amount of the over-charges, although, on the whole account, and when the balance at a subsequent period was struck, the principal was indebted to the broker in a sum far exceeding such over-charges. *Proctor v. Brain*, *M. & G. 4.* 284

BYE-LAW.

1. By letters patent of *Charles* the Second, the Coopers' Company were empowered to make such reasonable orders and ordinances as to the master and wardens should seem meet, for the good order, rule; and government of the company. By a bye-law in the reign of *George* the Second, the master and wardens were yearly to elect three persons of the livery to be stewards, who were to provide a dinner for the whole of the livery on Lord Mayor's Day (with such allowance out of the stock of the company as the master and wardens for the time being should think fit); and, if any person elected steward should refuse to provide the dinner, he was to forfeit 20*l.* to the use of the company, unless he would make oath in writing before a magistrate, that he was not worth 300*l.* at the time of his election or taking the oath:—*Held*, that such bye-law was bad, and that, the allowance to be made by the company being a condition precedent, the declaration was insufficient for want of an averment to that effect. *Carter v. Sanderson*, *T. 9 G. 4.* 164

CARRIER.

1. A carrier is an insurer of the goods that he carries—he is obliged, for a reasonable reward, to carry any goods that are offered him, to the place to which he professes to carry goods, if his carriage will hold them, and he is informed of their quality and value—he is not obliged to take a package, the owner of which will not inform him of its contents or value; but, if he do not ask for this information, or if, when he asks and is not answered, he still takes the package, he is responsible for its value, whatever that may be. By notice, limit his responsibility as an insurer; but a notice does not protect him against the effect of a loss occasioned by gross negligence. *Macklin v. Waterhouse*,

2. In an action against proprietors, for the loss of a parcel, the defendants proved a notice, exposed in a booking office at *Salisbury*, kept by a person named *Weeks*, in the following terms:—"Take notice. The proprietor of this office will not be accountable for any parcels or packages exceeding the value of five pounds, unless entered as such, and paid for accordingly." One *Weeks* was a defendant on the record; but no evidence was offered to shew that he was the same *Weeks* who was the proprietor of the office:—*Held*, that this was not a sufficient notice, and that the defendants were still subject to the unlimited responsibility of common carriers. *Ibid.*

3. *Quære*—Whether the entrusting valuable property to a servant, of whose character the carrier gave no account at the trial, was sufficient to authorize the Jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice? *Ibid.*

4. In an action against coach-proprietors, for the loss of a parcel direct-

ed to the plaintiffs in *London*, by their agent at *Kettering*, the defendants put in a notice in the following form:—
"George and Blue Boar, Holborn, London. Take notice. The proprietors of carriages which set out from this office, will not hold themselves answerable for any passenger's luggage, truss, parcel, or any package whatever, above the value of five pounds, if lost or damaged, unless the same be entered as such, and paid for accordingly, when delivered here, or to their agents in town or country." They also proved, that the plaintiffs were in the constant habit of sending parcels from *London* to the country and back by their coach. The Lord Chief Justice being of opinion, at *Nisi Prius*, that the notice applied only to the journey from, and not to that to *London*, the Jury found a verdict for the plaintiffs. On motion to set aside this verdict—The Court held, that the notice applied both to the out and home journeys: but, as it had not been left to the Jury to say whether or not the plaintiffs were aware that the coach by which the parcel was sent, was one that started from the *George and Blue Boar*, they directed a new trial, in order that that question might be submitted to another Jury. *Riley v. Horne, M. 9 G. 4. 331*

CERTIFICATE.

See ATTORNEY.

FINES AND RECOVERIES, 3.

PRACTICE, 4.

CHAMPERTY.

1. By an agreement between the plaintiff and defendant, the latter agreed to convey to the former certain freehold and copyhold lands, in consideration of a certain sum: and, after reciting that suits at law and in equity were pending between the defendant and *J. S.*, in which the defendant sought to recover arrears of

CONSTABLE.

rent from the latter, it was agreed that the plaintiff should receive such arrears to his own use, and also all sums which might be recovered from *J. S.* for dilapidations; and the plaintiff should be at liberty to use the defendant's name in the proceedings then pending between him and *J. S.*, and also in any action or suit which the plaintiff should think fit to commence against *J. S.* for the recovery of the said arrears of rent, or for dilapidations; the plaintiff paying the defendant's costs of the proceedings then pending, and indemnifying him against the costs of future proceedings instituted by the plaintiff in his name against *J. S.*:—*Held*, that this agreement was not void for champerty. *Williams v. Protheroe, H. 9 & 10 G. 4. 779*

COACH-PROPRIETOR.

See CARRIER.

COGNOVIT.

See PRACTICE, 1.

CONSCIENCE, COURT OF.

See COSTS, 4, 5.

CONSIDERATION.

See DEED, 2.

CONSTABLE.

1. A constable is justified in apprehending a person charged on suspicion of felony, if he have reasonable or probable cause to believe that the party charged is the felon; and, it having been left to the Jury to say, whether, on all the facts before them, they thought that the constable had reasonable ground to suppose that the party charged was guilty of felony, and whether they would have acted as he did:—*Held*, that this direction was right in substance, and that the constable did not exercise an undue

degree of coercion, although he apprehended the party (a female) at night, without any warrant, and conveyed her to prison previously to taking her before a magistrate. *Davis v. Russell*, H. 9 & 10 G. 4. 590

CO-PARCENERS.

See PLEADING, 7.

COSTS.

See DEED, 3, 4.

PRACTICE, 3, 4, 6, 8, 10, 11, 14, 15.

1. In an action for goods sold and delivered to the defendant's wife, he paid money into Court generally:—*Held*, that it merely amounted to an admission of the plaintiff's right of action to the amount paid in, and that the defendant was not thereby precluded from shewing that the goods furnished were not necessary for his wife, as she had a sufficient previous supply. But the Judge, at the trial, thinking differently, the Court directed a new trial, when the Jury found a verdict for the plaintiff, for 10s. The Judge, on application to the Court in *Banc*, certified under the statute of *Elizabeth*, to deprive the plaintiff of his costs. *Seaton v. Benedict*, M. 9 G. 4. 301

2. The defendant was arrested for 100*l*. He paid 10*l*. into Court, and, at the trial, a verdict was taken for the plaintiffs, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the parties, were referred, and the costs of the cause were to abide the event of the award. It appearing before the arbitrator, that there was a disputed and complicated account between the plaintiffs and defendant, the one claiming for extra work done to a house, and the other insisting on an allowance for deviations from the mode of finishing it according to the

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terms of an agreement, the arbitrator directed the defendant to pay the plaintiffs 29*l*. beyond the 10*l*. paid into Court, together with the costs of the award. The Court refused to allow the defendant his costs under the statute 43 *Geo.* 3, c. 46, as by the terms of the reference the costs were to abide the event of the award, and the defendant, under the circumstances, could not sue the plaintiffs for maliciously holding him to bail. *Turner v. Prince*, M. 9 G. 4. 305

3. In trespass for breaking and entering the plaintiff's close, the defendant pleaded not guilty, and seven special pleas justifying under a right of way. The plaintiff joined issue on the plea of not guilty, traversed the other pleas, and new assigned *extra viam*. The defendant joined issue on the traverses, and suffered judgment by default on the new assignment. The Jury found a verdict for the plaintiff, with one shilling damages, on the plea of not guilty, and assessed the damages on the new assignment at 40*l*., and the defendant had a verdict on one of the special pleas:—*Held*, that the plaintiff having been compelled to go down to trial on the general issue, he was entitled to the general costs of the cause; and it seems that the defendant ought to have withdrawn the general issue when he suffered judgment by default on the new assignment. *Vickers v. Gallimore*, M. 9 G. 4. 359

4. In an action to recover 8*l*. 6*s*. 6*d*. remaining due to the plaintiff on a bill of exchange for 8*l*. 6*s*. 6*d*., which bill was given to secure the balance of an account between the parties, originally amounting to more than 400*l*.:—*Held*, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs under the *Boston Court of Conscience* act (47 *Geo.* 3, s. 2, c. 1), as the 15th section provides that the commissioners are

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not empowered to decide on any debt for any sum, being the balance of an account on demand originally exceeding 5l. *Abbey v. Bill*, H. 9 & 10 G. 4. 534

5. An officer of the Sheriff of *Middlesex* kept a lock-up house in that county, where he resided and carried on his business. He also kept an office or counting-house in the city of *London*, where he carried on the business of Sheriff's officer, in partnership with his son:—*Held*, that he was a person seeking a livelihood, or trading or dealing in *London*, and within the jurisdiction of the *London Court of Conscience* act, 39 & 40 Geo. 3, c. civ. *Bushnell v. Levi*, H. 9 & 10 G. 4. 577

COURT OF CONSCIENCE.

See *COSTS*, 4, 5.

CURATE.

See *EVIDENCE*, 8,
PLEADING, 11.

CUSTOM.

See *EVIDENCE*, 8;
QUARE IMPEDIT, 2.

DEBT.

See *PLEADING*, 10.

Debt is maintainable against an executor or administrator in pursuance of a submission by him after the death of his testator, and a plea of *plene administravit* is no bar to the action; so the executor, by submitting to a reference, without protesting against the reference being taken as an admission of assets, admits that he has assets. *Stiddell v. A. Sutton*, H. 8 G. 4. 545

DECLARATIONS.

See *EVIDENCE*, 1.

DEED.

DEED.

1. *Quere*—Whether a blank left in a deed, to be filled up after its execution, with the consent of the party conveying, does not vitiate the conveyance. *Revett v. Browne*, T. 9 G. 4. 12

2. In a deed of 1672, by which the fourth turn to present to an advowson was conveyed, the considerations were stated to be "the sum of

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3. The defendant, being confined in prison for debt, at the suit of the plaintiff and another creditor, executed deeds of lease and release, and also an accompanying deed of trust, by which he conveyed all his property to the plaintiff, in trust to sell for the benefit of the defendant's creditors, the surplus, if any, to be paid to the defendant. The deeds also contained a covenant for the defendant and his wife to levy a fine to secure to the uses of the trust deeds, and the trustee was, in the first place, to pay and defray all the costs and expenses of executing the deeds. At the time of the execution by the defendant, a blank was left in the trust deed, for the amount of the sum due to the creditor at whose suit the defendant was in custody; and the amount having been ascertained by vouchers produced by the defendant, the blank was filled up on the following day, in his presence and with his

assent. He afterwards recognized and confirmed the deeds, by joining his wife in levying the fine, and desiring his tenants to pay the rents to the plaintiff:—*Held*, that the deed of trust was valid, although the blank was not filled up until after the execution. *Hudson v. Revett*, *H.* 9 & 10, *G.* 4. 668

4. On an issue directed by the Court of Common Pleas, to try whether certain trust and other deeds were valid or not, the attorney who prepared them on the retainer of the trustee, was held to be a competent witness to prove the execution by the defendant, and the filling up blanks in the deeds, although the witness was a party to the trust deed, and was entitled to his costs for preparing the instruments, and although he was a party in another suit, where his defence rested upon the trust deed. *Ibid.*

DEMURRAGE.

1. By the statute 7 & 8, *Edw.* 3, *c.* 15, it is enacted, that goods brought on the coast of London, and liable to dues to the king, shall be hindered on anchorage, if certificates of the payment shall be obtained, such as are forfeited to the king. *Held*, that it was the duty of the vessel to obtain such certificate, yet if he were prevented from so doing by the act of the consignee, the latter is liable for demurrage in the meantime. *Palmer v. Thomas*, *M.* 9, *G.* 4. 496

DEMURNER.

See PLEADING, 2, 9, 10.

DEPOSITIONS.

See BANKRUPT, 4, 9.

DEVISE.

See EVIDENCE, 4.

POWER.

1. Devise to trustees, in trust for devisor's eldest son, *J. H. L.*, for life:—remainder to trustees to preserve contingent remainders:—remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of *J. H. L.* severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age or priority of birth, in tail male: remainder to the first, second, third, fourth, fifth and other daughters of *J. H. L.* severally and successively, in tail general:—remainder to devisor's eldest daughter, *M. S. L.*, for life:—remainder to her first, second, third, fourth, fifth, and other daughters successively, in tail general:—remainder to devisor's second and other daughters successively, with like remainders in tail general to their respective issue:—remainder to devisor's sister, in fee:—*Held*, that the first or eldest son of the devisor's son *J. H. L.* took an estate in tail male, under the devise, expectant on the death of his father *J. H. L.*, although he was not named or enumerated in the will. *Langston v. Pole*, *M.* 9, *G.* 4. 490

2. By indenture, certain premises were vested in *J. B.*, to hold to him, his heirs and assigns, to the use of such person or persons as *G. B.*, the uncle of *J. B.*, should, by will, direct, limit, or appoint. *G. B.*, the uncle, by his will, directed that the premises should be to the use of *G. B.*, the second son of his nephew *J. B.*, to enter upon and possess the same after the decease of his father, the said *J. B.*:—and that *J. B.* and *G. B.* should, within one year after testator's decease, pay 100*l.* to two trustees named in the will, to discharge legacies; but

that, in case *J. B.* and *G. B.* should not pay that sum within the time limited, the trustees should let the premises, and receive the rents until the 100*l.* should be paid, they keeping possession of the title deeds, and not allowing *J. B.* or *G. B.* to sell or mortgage until the legacies were paid, and *G. B.* attained the age of twenty-one:—and that, if *G. B.* should die and leave no children lawfully begotten of his body, then the trustees were to sell the premises and distribute the money arising from the sale, among *G. B.*'s brothers and sisters:—*Held*, that *G. B.* took an estate tail in the premises devised, upon the death of his father, *J. B.* *Raggett v. Beatty*, *M. 9 G. 4.* 512

DISTRESS.

1. The plaintiff was possessed of a lathe, which was in the shop of one *G.* The latter being indebted to his landlord (the defendant) for rent, and the plaintiff being about to remove the lathe (between six and seven o'clock in the morning), the defendant interposed, saying, that "he would not suffer that, or any of the other things, to go off the premises till his rent was paid," and then left the shop. The plaintiff, however, removed the lathe, and about twelve o'clock the same day the defendant sent a broker to the premises to distrain, and followed and brought back the lathe that had been taken away. The plaintiff thereupon sued him in trover:—*Held*, that, the distress being commenced by the landlord's saying in the morning, that he would not suffer the things to be removed until his rent was paid, and completed by the entry of the broker afterwards, the landlord had a right to take and bring back the lathe that had been carried away in the mean time. *Wood v. Nunn*, *T. 9 G. 4.* 87

2. Where a person transfers all

his interest in a term to another, reserving rent to himself, it does not operate as an assignment, but as an under-lease: therefore, where *J. S.* had a term in certain premises, which expired on the 11th November, 1826, and, on the 11th September preceding, he verbally let them to the plaintiff, to hold till the 11th November, on paying down an immediate rent:—*Held*, that *J. S.* could not distrain, as the terms of the letting amounted to a lease, by which the whole of his interest passed to the plaintiff; and that, even if it were an assignment, it was not necessary that it should be in writing, as it was an assignment by operation of law, and within the exception in the third section of the statute of frauds. *Preece v. Corrie*, *T. 9 G. 4.* 57

3. A broker having seized goods under a distress for rent, the tenant desired time, and that the broker would not remove or sell; on which the latter required the tenant to sign written requests, from time to time, by which he also engaged to pay the charges of the levy, and the expenses of keeping a man in possession. The goods were not removed, and the broker applied for, and obtained those charges, but the tenant objected to the amount, as well as to the sum alleged to be due for rent:—*Held*, that the payment by the tenant was not a voluntary payment, and that, if the charges were illegal or excessive, he might recover them back in an action for money had and received. *Hills v. Street*, *T. 9 G. 4.* 96

4. A party entered into possession of premises under an agreement for a lease, at a certain rent, and occupied them more than a year, but paid no rent. An account was afterwards delivered to him by the landlord, charging him with half a year's rent, the amount of which he at first dis-

puted, but admitted that half a-year's rent was due, and named the amount, and the account was altered accordingly:—*Held*, that a yearly tenancy might thereby be implied, and that the landlord had a right to distrain. *Cox v. Bent*, *M. 9 G. 4.* 281

5. *J. S.* demised freehold and copyhold premises to the plaintiff for a term of years, and died before the expiration of the term, when they descended to his heir, who devised them to the defendant, for life. The defendant refused to take as devisee, claiming title as heir-at-law of the lessor, and, as she neglected to be admitted on the death of the devisee, the lord of the manor seized the copyhold, and received the rent. The heir-at-law of the lessor afterwards brought an ejectment against the tenant (the plaintiff), and sued out a writ of possession. The defendant, as devisee, subsequently brought an ejectment against the plaintiff, with a view to defeat the claim of the heir, and succeeded, and laid the demise on the death of the devisor, which was previously to the expiration of the lease:—*Held*, that the defendant could not distrain upon the plaintiff for rent due before or since the determination of the lease, more than three years having elapsed from that period, and she having treated the plaintiff as a trespasser, by bringing the action of ejectment; although the latter continued to occupy the premises from the time of the original letting to the day of the distress. *Bridges v. Smyth*, *H. 9 & 10 G. 4.* 740

DUCHY OF LANCASTER.

1. Although the king holds lands as Duke of Lancaster, he holds them as king also; and the prerogative and privileges of the king belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of

his Crown; therefore, a grant under the duchy seal is subject to all the incidents of a grant from the Crown. *Alcock v. Cooke*, *H. 9 & 10 G. 4.* 625

EJECTMENT.

See EVIDENCE, 1.

1. In the case of an adverse possession in ejectment, it is not necessary to give a notice to quit to the tenants in possession. Where, therefore, a party defended as landlord, and the occupiers suffered judgment by default:—*Held*, that the defendant could not object that the occupiers had not received notice to quit from the lessors of the plaintiff (judgment-creditors), who claimed adversely to the party under whom the tenants occupied. *Doe d. Cheese v. Creed*, *H. 9 & 10 G. 4.* 648

2. A mortgage deed contained a covenant, that, if the principal sum remained unpaid on a given day, the mortgagee might enter; and that, if not paid within a certain number of days from the day fixed for payment, he might sell without the concurrence of the mortgagor:—*Held*, that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit, or demanding possession. *Doe d. Fisher v. Giles*, *H. 9 & 10 G. 4.* 749

ELEGIT.

1. Two writs of *elegit*, tested and issued on the same day, upon judgments signed in the same Term, were delivered to the Sheriff together:—*Held*, that an entire moiety of the defendant's lands might be extended on each writ, although the judgments were obtained and writs sued out by different plaintiffs, and the inquisition on the second writ recited that a moiety of the lands had been extended on the first. *Doe d. Cheese v. Creed*, *H. 9 & 10 G. 4.* 648

ENCLOSURE-ACT.

See INCLOSURE-ACT.

ESTATE-TAIL.

See DEVISE, 1, 2.

EVIDENCE.

See BANKRUPT, 1.

BILLS OF EXCHANGE, 2.

BROKER.

INSPECTION OF PAPERS.

WITNESS.

1. In a question of pedigree, declarations of a party connected by marriage are receivable in evidence. Therefore, in an action of ejectment, declarations by a woman, that her first husband used to say that the estate would go to J. F., and, after his death, to his heir (under whom the lessor of the plaintiff claimed), were held to be admissible in evidence to shew the relationship and affinity of J. F. to the lessor of the plaintiff. *Doe v. Fuller v. Randall*, T. 9 G. 4.

2. The defendants sent bills of exchange to their agents abroad, who presented them to the drawees, and wrote the defendants that they had received the amount. The defendants afterwards acknowledged the receipt of the letter, and directed the agents to remit the amount to them. — Held, that, as the letter written by the agents, while acting within the scope of their authority as such, was recognized, and its terms adopted by the defendants, it was admissible in evidence to charge the latter with the receipt of the money. *Coates v. Bainbridge*, T. 9 G. 4. 142

3. A bankers' ledger is admissible in evidence to shew that a customer had no funds in their hands on a particular day, although entries were made therein by several of the clerks

of the house, *Furness v. Cope*, T. 9 G. 4. 197

4. In an action on the case for an injury done to the plaintiffs' reversion, they proved that they were tenants in common under a devise; and a witness stated that he occupied part of the premises under both the plaintiffs, and that he had at first an agreement in writing, which he signed; and another witness said, that he occupied under one of the plaintiffs only, and that he did not know the other. — Held, that there was sufficient evidence to go to a Jury, of a tenancy by both the occupiers under both the plaintiffs. But *quære*, whether it was not incumbent on the plaintiffs to produce the agreement, in order to shew the nature of their reversion. *Strother v. Barr*, T. 9 G. 4. 207

5. An answer in Chancery, by a mortgagor, to a bill of foreclosure filed by the mortgagee, is not admissible in evidence, the mortgagor having conveyed his interest in the estate to another, twenty years before the answer was filed, and the person to whom the estate was conveyed being no party to the mortgage, or to the proceedings in equity. *Hilly v. The Bishop of Exeter*, M. 9 G. 4. 266

6. A date of a letter, varying from the post-mark, it was objected that the mark could only be proved to be genuine by calling the person who impressed it on the letter; on which, the Judge who tried the cause offered to stop it till the arrival of a clerk from the Post-office; but, as it was not insisted on, and the Jury found that the post-mark was genuine, and gave their verdict accordingly, the Court refused to disturb it, the objection having been waived at the trial. *Abbey v. Lill*, N. 9 G. 4. 524

7. An entry in a register of clerical

EXECUTION.

cal instruments exhibited at a triennial visitation of the Bishop of *Bath and Wells*, in 1606, and deposited in the registry there, is admissible in evidence to shew that a person was admitted a curate of a church within the diocese of the bishop. *Arnold v. The Bishop of Bath and Wells*, H. 9 & 10 G. 4. 559

8. It seems that an allegation in a declaration in *Quare Impedit*, that there was an ancient custom for the several parishioners of a chapel, or the majority of them, in vestry assembled, to elect a curate, is not supported by evidence of a custom of a right to elect by those parishioners only who paid church-rates, or a certain sum to the curate above his tithes. *Ibid.*

9. Parol evidence cannot be resorted to, in order to support a prescriptive right to wreck, if it appear that the property in respect of which wreck is claimed, was in the Crown in the time of *Charles the First*, as a Jury could not infer that it was in those under whom the party claims, from time of legal memory. *Alcock v. Cooke*, H. 9 & 10 G. 4. 625

EXECUTION.

See *ELIGIT*.

LIEN 1.

PRACTICE, 3.

1. The defendant gave the plaintiff a cognovit, in *Hilary Term*, subject to a defeasance that no judgment should be entered up, or execution issued, until the 1st *April* then next. The defendant died in vacation before that day, and the plaintiff afterwards, and before *Easten Term*, entered up judgment and sued out a *fi. fa.* thereon, tested on the first return-day of *Hilary term*.—*Held*, regular; the judgment having relation to the first day of the term of which it was entered up. *Calvert v. Tomlin*, T. 9 G. 4. 1

FRAUDS, STATUTE OF. 803

EXECUTORS.

See *DEBT*.

PLEADING, 9.

FALSE IMPRISONMENT.

See *CONSTABLE*.

FIERI FACIAS.

See *PRACTICE*, 1.

FINES AND RECOVERIES.

1. One of two vouches became insane after he had executed a joint warrant of attorney, but before the perfecting of the recovery.—The Court allowed it to pass as to all the parties except him. *Egremont*, demandant; —, tenant; *Kale and Crooke*, vouches, M. 9 G. 4. 264

2. One of several deforciant, having become insane, the Court ordered the fine to pass as to all the other parties, notwithstanding the omission of the name of the lunatic in the proceedings. *Jameton*, plaintiff; *Fletcher* and wife and others, deforciant, M. 9 G. 4. 265, n.

3. A seal to a notarial certificate, of the administration of the oath to a commissioner abroad, who took the acknowledgment of a warrant of attorney, having been broken to pieces and lost, the Court, notwithstanding, allowed the recovery to pass, on filing an affidavit that the seal was duly affixed at the time the oath was administered. *Gerey*, demandant; *White*, tenant; *Fornes*, vouches, H. 9 & 10 G. 4. 558

FRAUDS, STATUTE OF.

See *DISTRESS*, 2.

1. The defendant having purchased the lease of a house at a public auction, he afterwards wrote to the auctioneer, requesting him to send the key, and stating, that his auctioneer

was desirous of taking an inventory of the fixtures. The auctioneers accordingly met, and, disagreeing as to the valuation, appointed an umpire, to whom they inclosed an inventory, stating the fixtures to be the property of the plaintiffs, and valued to the defendant. The umpire made a valuation, and appraised the fixtures at a certain sum, and returned the inventory with an appraisement duly stamped. The defendant, by letter, afterwards requested the plaintiff's auctioneer to remove the fixtures, which was done; and, on the following day, the defendant wrote the plaintiffs, that he would attend at the house and pay them the amount of the fixtures, as settled by the appraisers:—*Held*, that, taking the inventory, appraisement, and correspondence together, they established a sufficient memorandum of the contract to satisfy the terms of the statute of frauds. *Hemming v. Perry*, M. 9 G. 4. 375

FRAUDULENT PREFERENCE.

See BANKRUPT, 5.

GOODS SOLD & DELIVERED.

See PRACTICE, 4.

GRANT.

1. If the king make a grant which cannot take effect according to its terms, it must be concluded that he has been deceived in his grant, and it is void. Where, therefore, wreck was conveyed by lease, for a term of years, which had not expired; if such lease be not recited in a grant conveying an immediate estate in fee to the grantees, such grant is void, because the king having already leased the right of possession, he cannot convey the same right to another, and all leases from the king must be enrolled. *Alcock v. Cooke*, H. 9 & 10 G. 4. 625

2. Although the king holds lands as Duke of Lancaster, he holds them as king also; and the prerogative and privileges of the king belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his Crown: therefore, a grant under the duchy seal is subject to all the incidents of a grant from the Crown. *Ibid.*

3. It seems that wreck will not pass under general words in a grant. *Ibid.*

GROUND-RENT.

See LANDLORD AND TENANT, 2.

GUARANTIE.

See AFFIDAVIT TO HOLD TO BAIL, PLEADING, 5.

HUSBAND AND WIFE.

See BARRON AND FEME.

INCLOSURE ACT.

1. By an inclosure-act of 1769, commissioners were directed to allot to the rector of the parish of Waddingham cum Skitterby, each parcel of the arable fields and common pastures within the township of Skitterby, and also of the titheable parts of the township of Waddingham, as should (quantity, quality, and situation considered) be equal in value to two fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within the same lands and grounds; and the award of the commissioners was to be final, unless appealed against within six months; and, immediately after the enrolment of the award, all tithes arising within the lands or grounds directed to be inclosed, were to be extinguished: saving, however, to every person and

INSPECTION OF PAPERS.

persons, and their heirs (other than those to whom allotments should be made in respect of their several interests), all such estate and interest as they had in respect of the lands before the passing of the act. The commissioners, by their award, allotted to the rector land in lieu of his glebe lands in *Waddingham*, and in lieu of glebe and tithes in the townships of *Switterby* and *Atterby*; but there was no specific allotment in lieu of the tithes in *Waddingham*:—*Held*, that, as the commissioners had made no allotment in lieu of such tithes, the rector's right to the tithes in kind was reserved to him by the saving clause in the act, and that he was not barred from suing for them fifty-six years after the act had passed. *Thorpe v. Cooper* (in error), *T. 9 G. 4.* 245

INNUENDO.

See *LIBEL*, 1.

INSPECTION AND PRODUCTION OF PAPERS.

1. In trover for taking the plaintiff's goods, the Court refused to compel the defendant to produce an agreement entered into between the defendant and *J. T.*, for the purpose of getting it stamped, on the affidavit of the latter, stating that the plaintiff's goods were taken under a distress levied at the instance of the defendant on him, *J. T.*, and that the goods of the latter (which were released by the agreement) were sufficient to satisfy the distress. *Lawrence v. Hooker*, *T. 9 G. 4.* 9

2. The plaintiff and defendant signed an agreement on unstamped paper, which was given to a third person to hold for the benefit of all parties. The defendant requested the loan of it for the purpose of taking a copy, which was granted; and the

KING, PREROGATIVE OF. 805

plaintiff, within twenty-one days from the execution, desired the defendant to give it him to get it stamped, which he refused to do, nor did he return it to the party from whom he took it: on being afterwards required to produce it, he swore that it was either lost, or that he had destroyed it; but his attorney admitted that he had a copy:—the Court ordered the latter to produce such copy, and directed, that, if it were given in evidence duly stamped, the defendant should be precluded from producing the original to defeat it. *Bousfield v. Godfrey*, *H. 9 & 10 G. 4.* 771

JOINT-ACTION.

See *PRACTICE*, 2.

JOINT-STOCK COMPANY.

See *PLEADING*, 10.

JUDGE'S ORDER.

See *PRACTICE*, 7.

JUDGMENT.

See *PRACTICE*, 1.

KING, PREROGATIVE OF.

1. If the king make a grant which cannot take effect according to its terms, it must be concluded that he has been deceived in his grant, and it is void. *Atcock v. Cooke*, *H. 9 & 10 G. 4.* 685

2. Although the king holds lands as Duke of Lancaster, he holds them as king also; and the prerogative and privileges of the king belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his Crown: therefore, a grant under the dachy seal is subject to all the incidents of a grant from the Crown. *Ibid.*

3. All leases from the king must be enrolled. *Ibid.*

LANDLORD & TENANT.

See DISTRESS.

EJECTMENT.

(1) EJECTMENT.

MORTGAGE, 2.

1. A party entered into possession of premises under an agreement for a lease, at a certain rent, and occupied them more than a year, but paid no rent. An account was afterwards delivered to him by the landlord, charging him with half a year's rent, the amount of which he at first disputed, but admitted that half a year's rent was due, and named the amount, and the account was altered accordingly:—*Held*, that a yearly tenancy might thereby be implied, and that the landlord had a right to distrain. *Cox v. Bent*, *M. 9 G. 4.* 381.

2. A tenant, shortly after he had paid half a year's rent to his landlord, due at *Lady-day* preceding, was called upon by the agent of the ground landlord for ground-rent due previously, to *Lady-day*, and which the landlord had refused to pay:—*Held*, that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose:—*Held*, also, that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground-rent was paid:—and the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear:—*Held*, that the tenant was entitled to recover in an action on the case for a wrongful distress; and that a count, stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was

sufficient: *Carter v. Carter*, *H. 11 G. 4.* 782.

3. J. S. devised freehold and copyhold premises to the plaintiff for a term of years, and died before the expiration of the term, when they descended to his heir, who devised them to the defendant for life. The defendant refused to take as devisee, claiming title as heir-at-law of the lessor, and, as she neglected to be admitted on the death of the devisee, the lord of the manor seized the copyhold, and received the rent. The heir-at-law of the lessor afterwards brought an ejectment against the tenant (the plaintiff), and sued out a writ of possession. The defendant, as devisee, subsequently brought an ejectment against the plaintiff, with a view to defeat the claim of the heir, and succeeded, and laid the demise on the death of the deviser, which was previously to the expiration of the lease:—*Held*, that the defendant could not distrain upon the plaintiff for rent due before or since the determination of the lease, more than three years having elapsed from that period, and she having treated the plaintiff as a trespasser, by bringing the action of ejectment, although she latter continued to occupy the premises from the time of the original letting, to the day of the distress. *Bridges v. Smyth*, *H. 9 & 10 G. 4.* 740.

LEASE AND RELEASE.

See DEED, 3.

STAMPS, 2.

LETTER.

See EVIDENCE, 6.

LIBEL.

1. In an action for a libel, the declaration, without any introductory averment to explain the libel, set it out as follows:—"Who do you think was

LIEN.

the archbishop who promised *M.*, the priest of the mountains, 1,000*l.* in cash, and a living of 800*l.* a-year? Why, no less a personage than the Archbishop of Tuam (the plaintiff)!! The Archbishop wrote to a protestant clergyman, desiring him to make the offer, and to shew the letter, but not to surrender it into his possession, unless *M.* was disposed to accede with an *innuendo* that "the defendant meant by the libel, that the plaintiff had offered the said *M.* 1,000*l.* in cash, and a living of 800*l.* a-year, if he would accede to become a protestant clergyman." On motion in arrest of judgment, on the ground that there was nothing on the face of the libel, as set out in the declaration, to warrant the *innuendo* that the offer was made to induce *M.* to become a protestant clergyman.—*Held*, that the libel imputed immoral conduct to the plaintiff upon the face of it, and that, after verdict, the declaration was sufficient. *Archbishop of Tuam v. Robeson*, *T.* 9 G. 4. 32

20 In an action for the publication of a libel reflecting on the character of an individual, the defendant cannot justify the publication, by pleading that the libellous matter was communicated to him by a third person, whose name he disclosed at the time of the publication of the libel; and it seems doubtful whether such would be a sufficient defence in an action for oral slander. *De Crespigny v. Wellesley*, *H.* 9 & 10 G. 4. 695

LIEN.

1. If a party having a lien on goods, causes them to be taken in execution at his own suit, he thereby destroys his right of lien, although the goods were never removed from his premises. *Jacobs v. Latour*, *T.* 9 G. 4. 201

2. A trainer of race-horses has a lien on them for his charges for exercising and training. *Ibid.*

LIMITATION OF ACTIONS.

See BANKRUPT, 6.

LIMITATIONS, STATUTE OF.

1. It seems that the first section of the statute 9 Geo. 4, c. 14, has a retrospective operation, and applies to parol acknowledgments made before its provisions came into effect. *Amner v. Cattell*, *M.* 9 G. 4. 367

2. On the defendant's being applied to for payment of a debt of 20*l.*, barred by the statute of limitations, he said he was going to *H.* in the course of the week, and he would help the plaintiff to 5*l.*, if he could.—*Held*, that this was a mere conditional promise, and that it was incumbent on the plaintiff to shew that the defendant was of ability to pay. *Gould v. Shirley*, *H.* 9 & 10 G. 4. 381

3. The plaintiffs commenced an action against the defendant, as administrators.—Pleas, the statute of limitations, and that the plaintiffs were not administrators of the deceased at the time of the commencement of the suit. The letters of administration were not taken out till after the action was brought, and the statute of limitations would have been a bar to a new action. The plaintiffs being surviving partners as well as administrators of the deceased, the Court allowed the writ and declaration to be amended by describing them in their former character, on payment of costs by the plaintiffs, and allowing the defendant to plead *de novo*. *Taylor v. Lyon*, *H.* 9 & 10 G. 4. 586

LONDON COURT OF CONSCIENCE ACT.

See COSTS, 5.

LUNATIC.

See FINES & RECOVERIES, 1, 2.

808 MONEY HAD & RECEIVED.

MAGISTRATE.

See CONSTABLE.
TRESPASS, 2.

MALICIOUS TRESPASS ACT.

See TRESPASS, 5.

MEMORANDA, 261.

MISNOMER.

1. A misnomer of the Christian name of the tenant in a writ of right, can only be taken advantage of by a plea in abatement. *Jones*, demandant; *Wightwick*, tenant, *M. 9 G. 4.*

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MONEY HAD & RECEIVED.

See BANKRUPT, 5.

1. A broker having seized goods under a distress for rent, the tenant desired time, and that the broker would not remove or sell; on which, the latter required the tenant to sign written requests from time to time, by which he also engaged to pay the charges of the levy, and the expenses of keeping a man in possession. The goods were not removed, and the broker applied for and obtained those charges, but the tenant objected to the amount, as well as to the sum alleged to be due for rent. — *Held*, that the payment by the tenant was not a voluntary payment, and that, if the charges were illegal or excessive, he might recover them back in an action for money had and received. *Hills v. Street*, *T. 9 G. 4.*

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2. A tenant, shortly after he had paid half a-year's rent to his landlord, due at *Lady-day* preceding, was called upon by the agent of the ground landlord for ground-rent due previously to *Lady-day*, and which the landlord had refused to pay. — *Held*, that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of

MORTGAGE.

the ground landlord gave him time for that purpose; as the tenant was liable to be distrained on for such rent: — *Held*, also, that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground-rent was paid: — and, the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear: — *Held*, that the tenant was entitled to recover in an action on the case for a wrongful distress; and that a count, stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was sufficient. *Carter v. Carter*, *H. 9 & 10 G. 4.*

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MORTGAGE.

See EVIDENCE, 5.

1. A mortgagor cannot be charged with the expenses of preparing a deed of declaration of trust from the mortgage to a certain trust who advanced the money to the mortgagor; as such deed forms no part of the security for the mortgage. *Martin*, demandant; *Baxter*, tenant; *Grubb*, vouchee; *T. 9 G. 4.*

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2. A mortgage deed contained a covenant, that, if the principal sum remained unpaid on a given day, the mortgagee might enter; and that, if not paid within a certain number of days from the day fixed for payment, he might sell without the concurrence of the mortgagor: — *Held*, that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit, or demanding possession. *Dowd v. Fisher*, *H. 9 & 10 G. 4.*

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NOTICE OF ACTION.

NEGLIGENCE.

See CARRIER, 1, 8.

NEW ASSIGNMENT.

See COSTS, 3.

PRACTICE, 8.

NEW TRIAL.

See PRACTICE, 4.

NONSUIT.

See PRACTICE, 5.

1. In a joint action of trespass against several defendants, there cannot be a nonsuit as to one, and a verdict against the others. *Revett v. Browne*, T. 9 G. 4. 18

NOTICE OF ACTION.

1. The plaintiff, a surveyor, being occupied in cutting up turf, and laying down materials for making a road over common lands belonging to a township, the defendant, as *ferreee*, or person having the care of such lands, asked the plaintiff by whose authority he was employed; to which the plaintiff replied, that he was ordered to make the road by a magistrate. The defendant then told the plaintiff, that, if he did not desist, he should consider him as a wilful trespasser; and, as the plaintiff still continued the work, and did not shew any order or warrant authorizing him to make the road, the defendant caused him to be apprehended by a constable, and took him before a magistrate, who refused to receive the complaint; on which the plaintiff brought trespass against the defendant for an assault and false imprisonment:—*Held*, that the latter was entitled to notice of action, under the 7 & 8 Geo. 4, c. 80, s. 41, as he had reason to suppose that he was acting under colour of that statute, in causing the plaintiff to be appre-

PLEADING, 800

hended, although he was not, in fact, committing a wilful or malicious injury at the time. *Wright v. Wales*, H. 9 & 10 G. 4. 613

NOTICE TO QUIT.

See EJECTMENT, 1.

MORTGAGE, 2.

PARTNERS.

See PRACTICE, 18.

PATENT.

See PLEADING, 10.

PAYMENT.

See BILLS OF EXCHANGE, 1.

PAYMENT OF MONEY INTO COURT.

See COSTS, 2.

PRACTICE, 10, 11.

1. Payment of money into Court in *assumpsit* for goods sold and delivered, only amounts to an admission by the defendant of the plaintiff's right of action to the amount of the sum paid in, and applies only to a legal demand, and not to all the items contained in a bill of particulars, in which the goods are stated to have been supplied at different times. *Seaton v. Benedict*, T. 9 G. 4. 66

PEDIGREE.

See EVIDENCE, 1.

PETITIONING CREDITOR.

See BANKRUPT, 9.

PLEADING.

See BROKER.

BYE-LAW.

LANDLORD & TENANT, 3.

LIBEL, 1, 2.

MIXED.

PRACTICE, 2, 18, 19, 20.

1. In an action by a reversioner

against assignees of a bankrupt, for several breaches of covenant in a lease, the Court refused to allow the defendants to plead *non est factum*, and also, that the premises did not come to them by assignment. *Whale v. Lenny*, T. 9 G. 4. 19

2. A declaration in replevin alleged that the defendant, in the parish of A., in the county of Kent, in a certain close there, took the plaintiff's cattle.—Special demurrer, that it did not appear in what particular place in the parish the cattle were taken, whereby the defendant was prevented from making a proper defence, and from taking issue upon the place of taking:—It seems that the close should have been described by name or by abutments; but the plaintiff had leave to amend by inserting the name, the costs to abide the event of the cause. *Potten v. Bradley*, T. 9 G. 4. 78

3. In an action on a bail-bond, by the assignee against the sureties, the declaration stated the arrest of the principal by virtue of a *capias* sued out of the Court of our Lord the now King, before &c., then his Majesty's Justices of the Bench, at Westminster; and averred the condition of the bond to be, that, if the principal should appear, according to the exigency of the said writ, in the said Court, on &c., the bond was to be void: breach—non-appearance according to the exigency of the writ. On the production of the bond, the condition was, for the appearance of the principal "before our Sovereign Lord the King, at Westminster, on &c., to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of the King's Court of Common Bench:—Held, to be no variance. *Croft v. Stockley*, T. 9 G. 4. 81

4. The plaintiff sued the defendant in *assumpsit* for the breach of the following written agreement, signed

by the latter, viz, "I hereby agree to remain with Mrs. L. (the plaintiff's wife) for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c.:—Held, that this agreement did not support a declaration stating, that, in consideration that the plaintiff, at the request of the defendant, would receive her into his service, and cause her to be taught the business of a dress-maker, she agreed to remain in such service for the space of two years: nor was such agreement binding, as it contained no engagement by the plaintiff or his wife to teach. *Lees v. Whitcomb*, T. 9 G. 4. 86

5. The plaintiffs declared on a guarantee by the defendant, to pay for coals sold by them to N. H., to any amount not exceeding 300*l.*, in case he should not pay for the same within one month after the expiration of a credit of two months from the delivery. Proof, that, according to the custom of trade, the coals were supplied to N. H. daily, during the course of a month, and that, on the last day of the month, he gave a bill, payable at two months, for the amount of the coals so delivered:—Held, to be a fatal variance. *Holl v. Hadley*, T. 9 G. 4. 136

6. A plea of bankruptcy is no bar to a declaration framed in *tort*, charging the defendant, a stock-broker, with having sold the plaintiff's stock (under a general power with which he and his deceased partner were entrusted), without her permission or direction, and concealing the sale. *Parker v. Crale*, T. 9 G. 4. 150

7. In *Quare Impedit*, the declaration alleged that R. died seised in fee of an advowson, and intestate; that it descended to his four daughters and co-heirs, whereupon their husbands, in right of their wives, became seised; and that, whilst they were so seised, the church became vacant; that, be-

cause they did not agree, the husband of the eldest daughter, in right of his wife, presented; and that the fourth daughter and her husband died so seised of the one-fourth part of the wife of and in the advowson; after whose death the fourth part descended to the son and heir of the wife:—

Held, that the seisin of the latter was correctly stated, although it was objected, in arrest of judgment, that it was not alleged, that the fourth daughter was seised of a fourth part before her death, or that there had been a previous partition by the coparceners. *Gully v. The Bishop of Exeter*, *M. 9 G. 4.* 276

8. In an action on a bail-bond, it is not necessary to aver in the declaration, that the writ under which the party was arrested was issued on an affidavit of debt, or that the sum sworn to was indorsed on the writ. *Sharpe v. Abbey*, *M. 9 G. 4.* 312

9. By an agreement, after reciting that divers disputes and differences had arisen and were depending between the plaintiff and defendant, as executrix, respecting certain unsettled accounts between them, and that, for finally settling such differences, it was agreed that the matters in dispute should be referred to the final award of two arbitrators. Plea, by the executrix, that no evidence was offered of assets before the arbitrators, nor did she admit that she had any:—*Held*, ill, on general demurrer, as it imputed misconduct to the arbitrators, which is not the subject of a plea, but only a ground to apply to the Court to set aside the award. *Riddell v. Sutton*, *M. 9 G. 4.* 345

10. To an action of debt on bond, conditioned for paying the plaintiff the sum of 10,000*l.* upon his forming a company and procuring purchasers for nine thousand shares, which company was to carry on a distillery according to a process for which a patent had been granted; the defend-

ant pleaded—that the patent contained a proviso, that, if the patentee should transfer or assign the benefit thereof to any number of persons exceeding five, the patent should be void; and that it was intended, at the time of making the bond, that the company should consist of more than five persons, and be formed for the purpose of using and enjoying the privileges of the patent, and of the acting as a corporate body, and dividing the benefit of the patent into ten thousand shares, to be transferable and assignable, without any charter from the king; and that it was corruptly and illegally agreed between the plaintiff and defendant, that the plaintiff should form the company for such purposes as in the plea mentioned:—

Held, on general demurrer, that this plea was good, and an answer to the action. *Duvergier v. Fellowes*, *M. 9 G. 4.* 384

11. It seems that an allegation in a declaration in *Quare Impedit*, that there was an antient custom for the several parishioners of a chapel, or the majority of them, in vestry assembled, to elect a curate, is not supported by evidence of a custom of a right to elect by those parishioners only who paid church-rates, or a certain sum to the curate above his tithes. *Arnold v. The Bishop of Bath and Wells*, *H. 9 & 10 G. 4.* 559

12. A tenant, shortly after he had paid half a year's rent to his landlord, due at *Lady-day* preceding, was called upon by the agent of the ground landlord for ground-rent due previously to *Lady-day*, and which the landlord had refused to pay:—*Held*, that the payment of such ground-rent by the tenant, was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose, as the tenant was liable to be distrained on for such rent:—*Held*, also, that the tenant was entitled to deduct such pay-

ment from the next rent accruing due to his landlord, although it was not actually due at the time the ground-rent was paid:—and the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear:—*Held*, that the tenant was entitled to recover in an action on the case for a wrongful distress; and that a count, stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was sufficient. *Carter v. Carter*, H. 9 & 10 G. 4. 732

13. A defendant may plead matter *quis darrein continuance*, although he is under terms of rejoining issuably, and taking short notice of trial. *Bryant v. Perring*, H. 9 & 10 G. 4. 760

14. To a declaration on a bill of exchange due on the 5th December, the defendant pleaded a judgment recovered as of the Michaelmas term preceding:—*Held*, that the plaintiff might sign judgment, the plea being false upon the face of it. *Vere v. Carden*, H. 9 & 10 G. 4. 765

POST-MARK.

See EVIDENCE, 8.

POWER.

1. An estate was devised to trustees, with power, from time to time, at the request and by the direction and appointment of the tenant for life, signified by deed or writing under his hand and seal, attested by two or more witnesses, to sell the lands devised, and that, when they should be sold, in pursuance of the power given by the will, the money arising from the sale should be laid out by the trustees and invested in the purchase of other lands; and, until such invest-

ment, should be placed out on real or Government securities, with the consent of the tenant for life, testified as aforesaid. Part of the estate was sold, and the proceeds of the sale invested in the funds, without any consent by deed of the tenant for life; and the issue was, whether the money had been invested with such consent, according to the direction of the will:—*Held*, that it was properly left to the Jury, to say, whether the money had been invested with the consent of the tenant for life, by deed attested; and, they having found in the negative, the Court refused to disturb the verdict. *Cholmley, demandant; Paxton and others, tenants*, T. 9 G. 4. 127

PRACTICE.

See AFFIDAVIT.

AMENDMENT.

AWARD.

ATTORNEY.

COSTS.

ELEGIT.

NOTICE OF ACTION.

PLEADING.

VENUE.

1. The defendant gave the plaintiff a *cognovit*, in Hilary Term, subject to a defence that no judgment should be entered up, or execution issued, until the 1st April then next. The defendant died in vacation before that day; and the plaintiff afterwards, and before Easter Term, entered up judgment and shed out a *fi. fa.* thereon, tested on the first return-day of Hilary term. *Held*, regular, the judgment having relation to the first day of the term of which it was entered up. *Galvest v. Tomlin*, T. 9 G. 4.

2. In a joint action of trespass against several defendants, there can be a nonsuit as to one, and a verdict against the others. *Revett v. Brown*, T. 9 G. 4. 18

3. The Court refused to discharge out of custody a defendant taken under a *ca. sa.*, on the ground that he had been illegally apprehended and detained in custody, at the suit of the plaintiff, on a groundless criminal charge; after judgment obtained, the costs of the defendant's apprehension under which the plaintiff had paid. *Machie v. Warren, M. 9 G. 4. 279*

4. In an action for goods sold and delivered to the defendant's wife, he paid money into Court generally:—*Held*, that it merely amounted to an admission of the plaintiff's right of action to the amount paid in, and that the defendant was not thereby precluded from shewing that the goods furnished were not necessary for his wife, as she had a sufficient previous supply. But the Judge, at the trial, thinking differently, the Court directed a new trial, when the Jury found a verdict for the plaintiff for ten shillings. The Judge, on application to the Court in *Banc*, certified under the statute of *Elizabeth*, to deprive the plaintiff of his costs. *Seaton v. Benedict, M. 9 G. 4. 301*

5. It seems, that, if a verdict be found for the plaintiff, the defendant cannot move the Court to enter a non-suit, unless leave be reserved at the trial. *Ibid.*

6. On the 7th October the plaintiff's attorney wrote to the defendant, requesting payment of a debt, which the defendant paid to the plaintiff on the 11th, he not then knowing that a writ had been sued out. On the 16th, the plaintiff's attorney demanded costs of a writ, which not being paid, he, on the 8th November, caused the defendant to be arrested for the debt, on a *capias* issued on the 8th October preceding. The Court ordered the proceedings to be stayed without costs. *Booke v. Wasp, M. 9 G. 4. 304*

7. By a Judge's order, made upon hearing the attornies on both sides,

and by their consent, a cause was referred to arbitration, and the award recited that *the cause was referred by an order of Nisi Prius*:—it seems that such award is a nullity, and cannot be enforced by attachment:—but the rule *nisi* for setting it aside, not expressing it to have been drawn up on reading the order of reference:—*Held*, to be irregular. *Christie v. Hamlet, M. 9 G. 4. 316*

8. In trespass for breaking and entering the plaintiff's close, the defendant pleaded not guilty, and seven special pleas justifying under a right of way. The plaintiff joined issue on the plea of not guilty, traversed the other pleas, and new assigned *extra viam*. The defendant joined issue on the traverses, and suffered judgment by default on the new assignment. The Jury found a verdict for the plaintiff, with one shilling damages, on the plea of not guilty, and assessed the damages on the new assignment at 40*l.*, and the defendant had a verdict on one of the special pleas:—*Held*, that the plaintiff having been compelled to go down to trial on the general issue, he was entitled to the general costs of the cause; and it seems that the defendant ought to have withdrawn the general issue, when he suffered judgment by default on the new assignment. *Vickers v. Gallimore, M. 9 G. 4. 359*

9. A misnomer of the christian name of the tenant in a writ of right, can only be taken advantage of by a plea in abatement. *Jones, demandant; Wightwick, tenant, M. 9 G. 4. 318*

10. The defendant having paid money into Court as a security for the debt and costs, in pursuance of the statute 7 & 8 Geo. 4, c. 17, s. 2, and obtained a verdict, on which judgment was entered up:—*Held*, that the rule to have the money repaid to him is only a rule *nisi* in the first instance; and that, in order to make it absolute,

it is necessary to produce the record, and certificates from the clerk of the judgments and the Prothonotary, that judgment had been duly signed, and the money paid into Court. *Symes v. Rose*, M. 9 G. 4. 426

11. The defendant having been arrested, paid into Court the sum indorsed on the writ, and the further sum of twenty pounds as a security for costs, to abide the event of the suit, in pursuance of the statute 7 & 8 Geo. 4, c. 71, instead of putting in and perfecting special bail:—*Held*, that he was entitled to have the bail-bond delivered up to him to be cancelled. *Smith v. Jordan*, M. 9 G. 4. 428

12. A rule nisi for an attachment for non-payment of money pursuant to an award, was intitled, "In the matter of A. and B.," but the affidavit of service was intitled, "Between A. B., plaintiff, and C. D., defendant:"—*Held*, irregular, as the affidavit should have been intitled the same as the rule. *In re Houghton and Fallows*, M. 9 G. 4. 452

13. A gentleman who had taken the degree of Bachelor of Arts at Cambridge, articulated himself to an attorney for three years, but served only two months, and abandoned the contract. After the expiration of the three years mentioned in the original articles, he was assigned to another attorney, with whom he served two years and ten months:—*Held*, that, as the original articles had expired previously to the assignment, the service under the assignment was not a service within the terms of the statute 1 & 2 Geo. 4, c. 48, s. 1. *Ex parte Unthank*, M. 9 G. 4. 458

14. In a count in a writ of right, blanks were left for the name of the demandant's attorney, and for the word "esplees," and the count was indorsed in the name of an attorney in the country, without reference to

his agent in London. The tenant having signed judgment of *non-pros*—The Court held it to be irregular, and set it aside; with leave to the demandant to amend his count, on payment of costs. *Webb*, demandant; *Lane*, tenant, M. 9 G. 4. 478

15. The plaintiff's attorney left a writ of *scire facias* with the Sheriff, and directed it to be returned *nisi*; the Sheriff refused to return the writ, until he had been paid a fee, to which the attorney did not think him entitled; the plaintiff accordingly obtained a rule, calling on the Sheriff to shew cause why he should not return the writ, and pay the costs of the application. The Court, with a view to discourage the practice of ordering returns of *nisi*, discharged the rule without costs, and intimated an opinion, that, in future, two *nisi*s should not be deemed equivalent to a *scire facis*. *Beddington v. Beddington*, M. 9 G. 4. 479

16. A date of a letter varying from the post-mark, it was objected that the mark could only be proved to be genuine by calling the person who impressed it on the letter; on which the Judge who tried the cause offered to stop it till the arrival of a clerk from the Post-office; but, as it was not insisted on, and the Jury found that the post-mark was genuine, and gave their verdict accordingly, the Court refused to disturb it, the objection having been waived at the trial. *Abbey v. Lill*, H. 9 & 10 G. 4. 534

17. The plaintiff declared in *assumpsit* for work and labour, proved the value of the work done, and relied wholly on the *quantum meruit* count. The defendant proved that the plaintiff agreed to do the work for a certain sum. The plaintiff's counsel then proposed to shew that she was to be paid that sum if the work did not exceed a given specified quantity, but that, if it did, she was to be

paid accordingly:—*Held*, that she could not do so; as she should have relied on the contract in the first instance; and that it should have been stated by her counsel in the opening of the case to the Jury. *Soulby v. Pickford*, H. 9 & 10 G. 4. 545

18. The plaintiffs commenced an action against the defendant, as administratrixes—Pleas, the statute of limitations, and that the plaintiffs were not administratrixes of the deceased, at the time of the commencement of the suit. The letters of administration were not taken out till after the action was brought, and the statute of limitations would have been a bar to a new action. The plaintiffs being surviving partners as well as administratrixes of the deceased, the Court allowed the writ and declaration to be amended, by describing them in their former character, on payment of costs by the plaintiffs, and allowing the defendant to plead *de novo*. *Taylor v. Lyon*, H. 9 & 10 G. 4. 586

19. A defendant may plead matter *pais darrein continuance*, although he is under terms of rejoining issuably, and taking short notice of trial. *Bryant v. Perring*, H. 9 & 10 G. 4. 760

20. To a declaration on a bill of exchange due on the 5th December, the defendant pleaded a judgment recovered as of the Michaelmas term preceding:—*Held*, that the plaintiff might sign judgment, the plea being false upon the face of it. *Yere v. Carden*, H. 9 & 10 G. 4. 763

21. The plaintiff, having a claim on the defendant, under a charter-party, which the latter disputed; it was, by bonds of submission, referred to two arbitrators and an umpire; and the order of reference was made a rule of Court. The umpire having conducted himself with partiality towards the defendant, the plaintiff revoked his authority to the arbitrators, and went to Scotland, where he resided. The

arbitrators afterwards made an award, by which they found that nothing was due to the plaintiff, and directed him to pay half the costs of the reference; notwithstanding which, he commenced an action against the defendant on the charter-party, and recovered a verdict and sued out execution. The Court refused to stay the execution, although it was insisted that the plaintiff was liable to an attachment for non-performance of the award, and that he could not be served with process, he being out of the jurisdiction of the Court, and that the defendant had commenced an action against him on the arbitration-bond. *Stewart v. Williamson*, H. 9 & 10 G. 4. 765

PREROGATIVE OF THE CROWN.

See KING, PREROGATIVE OF, &c.

PROCESS.

See PRACTICE, 1, 3, 6, 9, 15.

PROMOTIONS, 261.

PUIS DARREIN CONTINUANCE.

See PRACTICE, 19.

QUARE IMPEDIT.

See EVIDENCE, 8.

PLEADING, 7, 11.

1. In *Quare Impedit*, the admission having been stated to have taken place in 1591, *juxta consuetudinem, &c.*:—*Held*, that it should have been left to the Jury to say, whether the custom was an ecclesiastical or a common law custom:—But, it having been left to them generally to consider, whether the election were valid or not, the Court directed a new trial. *Arnold v. The Bishop of Bath and Wells*, H. 9 & 10 G. 4. 559

2. It seems that an allegation in a declaration, that there was an ancient
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custom for the several parishioners of a chapel, or the majority of them, in vestry assembled, to elect a curate, is not supported by evidence of a custom of a right to elect by those parishioners only who paid church-rates, or a certain sum to the curate above his tithes. *Ibid.*

RECOVERY.

See FINES & RECOVERIES.

REPLEVIN.

See LANDLORD & TENANT, 3.
PLEADING, 2.

REQUESTS, COURT OF.

See COSTS, 4, 5.

RIGHT, WRIT OF.

See WRIT OF RIGHT.

SCHOOLMASTER.

See ASSUMPSIT, 2.

SCIRE FACIAS.

See PRACTICE, 15.

SECURITY FOR COSTS.

See PRACTICE, 10, 11.

SHAM PLEA.

See PLEADING, 14.

SHERIFF.

See PRACTICE, 15.

TRESPASS.

TROVER.

1. The plaintiff's attorney left a writ of *scire facias* with the Sheriff, and directed it to be returned *nihil*: the Sheriff refused to return the writ, until he had been paid a fee, to which the attorney did not think him entitled; the plaintiff accordingly obtained a rule calling on the Sheriff to shew cause why he should not return the writ, and pay the costs of the appli-

cation. The Court, with a view to discourage the practice of ordering returns of *nihil*, discharged the rule without costs, and intimated an opinion, that, in future, two *nihil*s should not be deemed equivalent to a *scire facit*. *Reddington v. Beddington*, M. 6 G. 4. 478

SHIPPING.

See DEMURRAGE.

SLANDER.

See LIBEL, 2.

STAMPS.

1. A deed of assignment of a mortgage requires an *ad valorem* stamp, if a further sum be added to the principal before secured; and the mortgagor is liable to the charge of such duty. The 3rd section of the statute 8 Geo. 4, c. 117, applies only to additional securities between the same parties, or further advances to the principal before secured. *Martin*, demandant; *Baxter*, tenant; *Grubb*, vouchee, T. 9 G. 4. 240

2. Where deeds of lease and release, and a deed of trust, conveying property for the benefit of creditors, form but one transaction or assurance, the lease and release do not require an *ad valorem* stamp, as they fall within the exception of a conveyance for the benefit of creditors, in the statute 55 G. 3, c. 184, sched. part 1, tit. "Mortgage." *Hudson v. Roett*, H. 9 & 10 G. 4. 668

3. The defendant having purchased the lease of a house at a public auction, he afterwards wrote to the auctioneer, requesting him to send the key, and stating, that his auctioneer was desirous of taking an inventory of the fixtures. The auctioneers accordingly met, and, disagreeing as to the valuation, appointed an umpire, to whom they inclosed an in-

STATUTES, DECISIONS ON.

ventory, stating the fixtures to be the property of the plaintiffs, and valued to the defendant. The umpire made a valuation, and appraised the fixtures at a certain sum, and returned the inventory with an appraisement duly stamped. The defendant, by letter, afterwards requested the plaintiffs' auctioneer to remove the fixtures, which was done; and, on the following day, the defendant wrote the plaintiffs that he would attend at the house and pay them the amount of the fixtures, as settled by the appraisers. The first and last letters were signed by the defendant, but the first only was stamped:—*Held*, that one stamp was sufficient, as it fell within the proviso in the statute 55 Geo. 3, c. 184, sched. part 1, tit. "Agreement." *Hemming v. Perry*, M. 9 G. 4. 375

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See FRAUDS, STATUTE OF.

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STAYING PROCEEDINGS.

See PRACTICE, 6, 21.

SUBMISSION.

See AWARD.

TITHES.

See INCLOSURE-ACT.

TOLLS.

1. The plaintiff claimed a right, under a custom, to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove, and landing fish therein. It was proved that the plaintiff and his ancestors had, from time immemorial, furnished and maintained a capstan and rope for the use of the fishermen; and that, in stormy weather, boats could not be drawn up from the sea, with safety to the crews, without them; that the spot on which the capstan stood belonged to the plaintiff, but the rest of the cove, over which the boats were drawn, was the property of a third person:—*Held*, that the keeping the capstan and rope was a good consideration for the exaction of toll from all boats landing in the cove, whether the capstan and rope were used or not. *Earl of Falmouth v. George*, M. 9 G. 4. 457.

TRESPASS.

See CONSTABLE.

1. The plaintiff was possessed of a chapel, which he assigned, together with all his other property, to a trustee, for the purpose of paying off debts and incumbrances. The trustee took possession of the property under the conveyance, and the defendants, as his servants, broke and entered the chapel, the key being in the possession of the plaintiff, who occasionally preached there:—*Held*, that the mere possession of the key did not give the plaintiff such a

right of possession of the chapel as to enable him to maintain trespass. *Revett v. Bromne*, T. 9 G. 4. 12

2. In a joint action of trespass against several defendants, there cannot be a nonsuit as to one, and a verdict against others. *Ibid.*

3. *Quære*, Whether a woman who cohabits with a man, assumes his name, and represents herself as his wife, can maintain trespass against a Sheriff for taking in execution furniture alleged to be her property, but being in the house in which the parties resided? But, it having been left to the Jury to say, whether, under the circumstances, the property might not have been given up by the woman to the man, during cohabitation, and they having found in the affirmative, the Court refused to disturb the verdict. *Edwards v. Farebrother*, M. 9 G. 4. 393

4. In trespass for breaking and entering the plaintiff's close, the defendant pleaded not guilty, and seven special pleas justifying under a right of way. The plaintiff joined issue on the plea of not guilty, traversed the other pleas, and new assigned *extra viam*. The defendant joined issue on the traverses, and suffered judgment by default on the new assignment. The Jury found a verdict for the plaintiff with one shilling damages, on the plea of not guilty, and assessed the damages on the new assignment at 40s., and the defendant had a verdict on one of the special pleas:—*Held*, that the plaintiff having been compelled to go down to trial on the general issue, he was entitled to the general costs of the cause; and it seems that the defendant ought to have withdrawn the general issue when he suffered judgment by default on the new assignment. *Keecher v. Gallimore*, M. 9 G. 4. 359

5. The plaintiff, a surveyor, being occupied in cutting up turf, and lay-

ing down materials for making a road over common lands belonging to a township; the defendant, as *fen-reeve*, or person having the care of such lands, asked the plaintiff by whose authority he was employed; to which the plaintiff replied, that he was ordered to make the road by a magistrate; that the defendant then told the plaintiff, that, if he did not desist, he should consider him as a wilful trespasser; and, as the plaintiff, still continued the work, and did not shew any order or warrant authorizing him to make the road, the defendant caused him to be apprehended by a constable, and took him before a magistrate, who refused to receive the complaint; on which the plaintiff brought trespass against the defendant for an assault and false imprisonment:—*Held*, that the latter was entitled to notice of action, under the 7 & 8 Geo. 4, c. 30, s. 41, as he had reason to suppose that he was acting under colour of that statute, in causing the plaintiff to be apprehended, although he was not in fact committing a wilful or malicious injury at the time. *Wright v. Wales*, H. 9 & 10 G. 4. 618

TROVER.

See INSPECTION & PRODUCTION OF PAPERS.

1. The plaintiff ordered a chariot to be built, which was to be finished according to certain directions, and for which he paid; and, after it had been finished in other respects, he ordered a front seat to be added, but, the builder not executing the order, the plaintiff sent for the chariot several times, and the builder promised to deliver it. Subsequently, the plaintiff said he did not want the chariot, and ordered it to be sold, and it was standing in the builder's warehouse, for that purpose, the front seat not having been added, when a commission of bankrupt was issued against

the builder, and his assignees seized and sold the carriage under the commission:—*Held*, that the plaintiff had a sufficient property in the chariot to maintain trover, and that it did not pass to the assignees, as being in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner, within the 72nd section of the statute 6 G. 4, c. 16. *Carruthers v. Payne*, M. 9 G. 4. 429

2. The charterers of the plaintiff's ship for three voyages, on her return home from the second, removed the anchors and cables to the defendant's wharf. Shortly afterwards, the ship was seized under an Admiralty warrant, and sold for debts due on bottomry bonds, and the wages of the crew. Four days previously to the sale, the plaintiff demanded the anchors, &c., from the defendants, they not being included in the sale account of the ship, and they refused to deliver them up:—*Held*, that the plaintiff was not entitled to recover the anchors and cables in trover against the defendants, although the Jury found that they had been removed by the charterers to avoid the process of the Admiralty Court, and not in the ordinary course of business, as the plaintiff had no right of possession until after the sale. *Ferguson v. Cristall*, H. 9 & 10 G. 4. 524

3. The statute 3 Geo. 4, c. 39, s. 1, enacts, "That every warrant of attorney to confess judgment in any personal action, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets in the Court of King's Bench;" and the second section enacts, "That, if, at any time after the expiration of twenty-one days next after the execution of such warrant, a commission of bankrupt shall be issued against the person who has given it,

then, and in such case, unless such warrant of attorney shall have been filed as aforesaid, within the said twenty-one days from the execution thereof, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees. An affidavit made by the attesting witness to the warrant of attorney, and filed with it, merely stating its date, and that he saw the party execute it, without specifying the day on which it was executed:—*Held*, to be insufficient; and that the Sheriff who had seized and sold goods under a writ issued at the instance of a judgment-creditor on a judgment entered up on the warrant of attorney, was liable to the assignees of the party whose goods were seized, in an action of trover, a commission of bankrupt having been issued against him after the seizure, but before the sale. *Dillon v. Edwards*, H. 9 & 10 G. 4. 550

TRUSTEES.

See DEVISE.

VARIANCE.

See PLEADING, 3, 5.

1. It seems that an allegation in a declaration in *Quare Impedit*, that there was an antient custom for the several parishioners of a chapel, or the majority of them, in vestry assembled, to elect a curate, is not supported by evidence of a custom of a right to elect by those parishioners only who paid church-rates, or a certain sum to the curate above his tithes. *Arnold v. The Bishop of Bath and Wells*, H. 9 & 10 G. 4. 559

VENUE.

1. The plaintiff declared on a promissory note, and for goods sold—The Court would not change the venue, on an affidavit stating that the

WARRANT OF ATTORNEY.

principal and interest due on the note had been paid, and that the plaintiff had promised to give it up to the defendant—as it was incumbent on the defendant to state that the note did not exist. *Richards v. Furnien*, M. 9 G. 4. 318

2. The defendant having obtained a rule nisi to change the venue from London to Warwick, on the usual affidavit, cause was shewn on an affidavit of the plaintiff's attorney, which stated, that the defendant's attorney had said that he should change the venue, as the statute 9 Geo. 4, c. 14, would come into operation before the cause could be tried, and that he should thereby defeat the plaintiff, as he had no promise in writing. *Best*, C. J., and *Park*, J., were of opinion, that the venue ought not to be changed. *Burrough*, J., and *Gaselee*, J., thought otherwise, and that the defendant's attorney should be allowed to answer the affidavit; but, as he failed to do so satisfactorily, the rule was eventually discharged. *Amner v. Cattell*, M. 9 G. 4. 367

WARRANT OF ATTORNEY.

See FINES AND RECOVERIES. 1, 3.

1. The statute 3 Geo. 4, c. 32, s. 1, enacts, "that every warrant of attorney to confess judgment in any personal action, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets, in the Court of King's Bench:—*Held*, that an affidavit made by the attesting witness to the warrant of attorney, and filed with it, merely stating its date, and that he saw the party execute it, without specifying the day on which it was executed, is insufficient. *Dillon v. Edwards*, H. 9 & 10 G. 4. 550

WITNESS.

WARRANTY.

1. In an action for the breach of a warranty of a horse, the plaintiff failed to prove a warranty at the time of sale, but, it appeared that he had returned the horse to the defendant, who stated that he would keep it without prejudice, but he afterwards used it and offered to sell it to a third person:—*Held*, that, by so doing, he rescinded the original contract of sale; and, the Jury having found a verdict for the plaintiff, for the sum paid for the horse, the Court refused to disturb it. *Long v. Preston*, M. 9 G. 4. 262

WILL.

See DEVISE.

WITNESS.

1. In *Quare Impedit*, the father of the defendant, in support of the claim of the latter to present, was called as a witness; when, it appearing that he was tenant by the curtesy, his late wife having been seised of an estate of inheritance, his testimony was rejected, although it was insisted that he could have no interest in the event of the suit, his right to present (if any) having lapsed, more than six months having expired since the vacancy happened—for, if the bishop neglect or omit to present within the six months, the party originally entitled has still a right to present. *Gully v. The Bishop of Exeter*, M. 9 G. 4. 266

2. The plaintiff claimed a right, under a custom, to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove and landing fish therein:—*Held*, that a fisherman frequenting the cove was not a competent witness to disprove the existence of the custom, as he had an immediate interest in the event of the suit; for, if the defendant obtained a

WRIT OF RIGHT. 821

verdict, the witness would thus be protected from the consequences of the non-payment of tolls by himself. *The Earl of Falmouth v. George*, M. 9 G. 4. 457

3. On an issue directed, by the Court of Common Pleas, to try whether certain trust and other deeds were valid or not, the attorney who prepared them on the retainer of the trustee, was held to be a competent witness to prove the execution by the defendant, and the filling up blanks in the deeds, although the witness was a party to the trust deed, and was entitled to his costs for preparing the instruments, and although he was a party in another suit, where his defence rested upon the trust deed. *Hudson v. Revett*, H. 9 & 10 G. 4. 663

WRECK.

See EVIDENCE, 9.

1. Where wreck is conveyed by lease for a term of years, which has not expired; if such lease be not recited in a grant conveying an immediate estate in fee to the grantees, such grant is void; because, the King having already leased the right of possession, he cannot convey the same right to another. *Alcock v. Cooke*, H. 9 & 10 G. 4. 625

2. It seems that wreck will not pass under general words in a grant. *Ibid.*

WRIT OF RIGHT.

1. A misnomer of the christian name of the tenant in a writ of right, can only be taken advantage of by plea in abatement, *Jones*, demandant; *Wightwick*, tenant, M. 9 G. 4. 318

2. In a count in a writ of right, blanks were left for the name of the demandant's attorney, and for the word "esplees," and the count was indorsed in the name of an attorney in

the country, without reference to his agent in *London*. The tenant having signed judgment of *non-pros*—The Court held it to be irregular, and set

it aside; with leave to the demandant to amend his count, on payment of costs. *Webb*, demandant; *Lane*, tenant, *M. 9 G. 4.* 478

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